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Attachments: Executed ESA-FIFRA MOA 1.31.18.pdf

MEMORANDUM OF AGREEMENT

between

the Environmental Protection Agency, the Department of the Interior,
and the Department of Commerce

on

Establishment of an Interagency Working Group to Coordinate Endangered Species Act
Consultations for Pesticide Registrations and Registration Review

I. PURPOSE

This Memorandum of Agreement (MOA) establishes an interagency working group ("Working Group") comprised of representatives from the Environmental Protection Agency (EPA), the Department of the Interior (DOI), which includes the Fish and Wildlife Service (FWS), and the Department of Commerce (DOC), which includes the National Marine Fisheries Service (NMFS) (collectively, "the Signatory Agencies"). The Working Group will provide recommendations to EPA, FWS, and NMFS leadership on improving the Endangered Species Act (ESA)¹ consultation process for pesticide registration and registration review ("pesticide consultation process") and will ensure that the new process is recorded and formalized as appropriate.

II. BACKGROUND

Statutory Framework and Pending Reviews

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)² governs pesticide registration, distribution, and use. EPA implements FIFRA, while consulting with the Department of Agriculture (USDA) on pesticide-related rulemakings. Most pesticides distributed or sold in the United States must obtain a registration from EPA prior to their use. FIFRA additionally requires that EPA review pesticide registrations every 15 years. As of July 1, 2017, EPA has been processing 725 registration review cases that cover approximately 1,140 pesticide active ingredients.

The ESA seeks to conserve threatened and endangered species and the ecosystems upon which they depend. Pursuant to ESA section 7(a)(2), federal agencies shall "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" of any listed species or result in adverse modification of critical habitat.³ Section 7(a)(2) further requires agencies to consult with FWS, NMFS, or both (collectively, "the Services") when contemplating an agency action subject to ESA. Courts have found specific

¹ 16 U.S.C. § 1531 *et seq.*

² 7 U.S.C. § 136 *et seq.*

³ 16 U.S.C. § 1536(a)(2).

registrations and registration reviews of pesticides under FIFRA to be agency actions subject to ESA's consultation requirements.

Status of Pesticide Consultations

America's 3.2 million farmers operate over 2 million farms and annually produce billions of pounds of food. Responsible pesticide use is an essential tool for managing America's estimated 915 million acres of farmland. At the same time, pesticides may impact non-target organisms, including fish and wildlife.

For decades, EPA and the Services have worked to determine how best to fulfill ESA's consultation requirements when registering and reregistering pesticides:

- Initially, EPA and FWS conducted ESA consultations on individual pesticides but ended this practice after it was deemed too lengthy and ineffective in protecting listed species.⁴
- In 1981, EPA in cooperation with FWS adopted a "cluster" approach pursuant to which all pesticides registered for the same use pattern were examined concurrently. At that time, EPA received biological opinions from the Services for four clusters and began drafting implementation plans for the biological opinions. However, the implementation plans proved to be unworkable because they were "far more complex and time-consuming than originally anticipated," and as a result, the cluster approach was abandoned in 1998.⁵
- In 1989, after collaboration among EPA, the Services, and USDA, and the conclusion of a notice-and-comment period, the agencies published a revised Endangered Species Protection Plan and returned to species-based assessments. Under this approach, EPA identified species most vulnerable to pesticides, the Services identified the counties where those species lived, and USDA provided information on crop growth and pesticide application.
- In 2001, a non-government organization successfully challenged EPA's failure to consult with NMFS on 54 pesticide active ingredients and their effect on 25 listed species of salmon and steelhead.⁶ Partially in response to this challenge, in 2004, EPA and the Services issued counterpart regulations, which created a number of different procedures to conduct informal and formal ESA pesticide consultations.⁷ The implementation of one such procedure for informal consultation, the alternative consultation procedure, was challenged and, in 2006, held to be arbitrary and capricious.⁸

In an effort to address issues between federal agencies related to identifying and implementing appropriate scientific and technical approaches, EPA, the Services, and USDA requested the

⁴ ENVIRONMENTAL PROTECTION AGENCY, REPORT TO CONGRESS ON THE ENDANGERED SPECIES PROTECTION PROGRAM AS IT RELATES TO PESTICIDE REGULATORY ACTIVITIES, at 6 (1991), *available here*.

⁵ *Id.* at 8.

⁶ *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005), *cert. denied*, 546 U.S. 1090 (2006).

⁷ 50 C.F.R. § 402.40-48 (2016).

⁸ *Wash. Toxics Coal. v. United States Dep't of the Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006).

National Research Council (NRC) “to examine scientific and technical issues related to determining risks posed to listed species by pesticides.”⁹ In 2013, the NRC released a report that identified categories of issues the agencies should seek to resolve and strategies to improve interagency coordination. As a result of the NRC report, EPA and the Services developed and are implementing a set of “interim agreements” and a “stakeholder engagement process.”

The pesticide consultation process that has evolved since the NRC report remains highly challenging. For example, although EPA is required to complete registration review of more than 700 cases by 2022, it has taken EPA and the Services several years to address the three active ingredients in the first pesticides covered using the most recent approach. This experience has shown that the NRC report did not foresee the challenges associated with implementing its recommendations in view of the statutory requirements and associated regulations that the EPA and the Services must follow. In addition, the pesticide consultation process continues to be subject to litigation and various consent decrees.

III. ACTIONS

Creation of Interagency Working Group

This MOA establishes a Working Group to support EPA and the Services in meeting their obligations related to the pesticide consultation process. The Working Group shall consist of the Signatory Agencies to this memorandum. In addition, the Signatory Agencies request that USDA, the Council on Environmental Quality (CEQ), and the Office of Management and Budget (OMB) join the Working Group, and that CEQ serve as Chair of the Working Group. The Signatory Agencies may also request the participation of other federal agencies or offices in the Working Group as appropriate.

Action Plan

Federal agency coordination and support is necessary to meet ESA obligations with regard to pesticide consultations. The Working Group will (1) outline a legal and regulatory framework by analyzing the relevant statutes, regulations, and case law, (2) review past pesticide consultation practices to learn from those experiences, (3) develop scientific and policy approaches that will increase the accuracy and timeliness of the pesticide consultation process, and (4) memorialize the proposed approach through a memorandum of understanding, revised regulations, or another legal mechanism:

1. *Analyze relevant statutes, regulations, and case law.* The Working Group will review (1) the statutory requirements under ESA and FIFRA, (2) the case law that has developed on the intersection of ESA and FIFRA, and (3) existing regulations for the pesticide consultation process. For example, the Working Group will review 50 C.F.R. § 402.46-47 (the optional formal consultation procedure) and determine whether its application would improve the pesticide consultation process. The Working Group should also provide advice on how best to define the scope of the agency action subject to consultation, and on how to properly identify and classify direct and indirect effects of

⁹ ASSESSING RISKS TO ENDANGERED AND THREATENED SPECIES FROM PESTICIDES, at 3 (2013) available [here](#).

the agency action. The Working Group will identify statutory obligations and limitations, providing a legal and regulatory framework to guide the Working Group as it develops its scientific and policy recommendations for the pesticide consultation process.

2. ***Review past ESA pesticide consultation practices to learn lessons from recent experience.*** The Working Group will review current and previous pesticide consultation practices to identify problems and areas for improvement, as well as best practices that should be used in future pesticide consultations.
3. ***Prepare recommendations to improve scientific and policy approaches.*** The Working Group will provide recommendations on how to improve scientific and policy approaches to ESA pesticide consultations. For example, the Working Group will develop a streamlined process for identifying which actions require no consultation, informal consultation, or formal consultation. The Working Group will also help provide clarity as to what constitutes the “best scientific and commercial data available” in the fields of pesticide use and ecological risk assessment, which EPA and the Services are required to use under ESA section 7(a)(2).
4. ***Document the approach.*** To the extent that current authorities and practices do not allow for the timely and accurate review of pesticides consistent with governing authorities, the Working Group may memorialize its recommendations for a revised regulatory framework, including addressing agency responsibilities, recommended technical approaches, and recommendations for new regulations, a memorandum of understanding, or other appropriate documentation. Documenting the new approaches would promote lasting cooperation between the agencies.

IV. OTHER PROVISIONS

1. ***Period of Agreement.*** The term of this MOA will commence upon full execution by the Signatory Agencies, and shall remain in effect until such time as the MOA is terminated by any Signatory Agency or its successor.
2. ***Modification.*** This MOA, or subsequent annexes, may only be modified by mutual agreement of the Signatory Agencies or their successors. Such modifications shall be in writing and will take effect upon execution by the Signatory Agencies or their successors.
3. ***Rights and Benefits.*** Nothing in this MOA is intended to diminish or otherwise affect the authority of any agency to carry out its statutory, regulatory, or other official functions, nor does it create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies or officers, State agencies or officers carrying out programs authorized under Federal law, or any other person.
4. ***Agreement Does Not Involve Funding.*** This MOA, in and of itself, does not result in the transfer of funds or other financial obligations between the Signatory Agencies. No provision of this MOA shall be interpreted to require obligation or payment of funds in

violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. Funding arrangements, if any, shall be the subject of separate agreements that will be subject to the availability of funds.

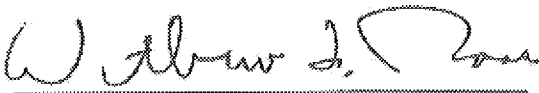
5. **Stakeholder Input.** In carrying out Section III of the MOA, the Working Group is not prohibited from seeking or receiving stakeholder expertise, experience, input, information, or other items deemed appropriate, consistent with the requirements of the Federal Advisory Committee Act (FACA).

V. SIGNATORIES



Ryan K. Zinke
Secretary
U.S. Department of the Interior

Date: 1/31/2018



Wilbur Ross
Secretary
U.S. Department of Commerce

Date: JAN 31 2018



Scott Pruitt
Administrator
U.S. Environmental Protection Agency

Date: 1/31/2018

Message

From: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
Sent: 3/2/2018 11:36:10 PM
To: Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, E]
Subject: RE: Invitation to Meet

We hope to see you!

Mary Jo Tomalewski
Executive Assistant to the President & CEO
CropLife America
Direct Dial [redacted] Ex. 6
Mobile [redacted] Ex. 6
Email mjtomalewski@croplifeamerica.org

-----Original Message-----

From: Bennett, Tate [mailto:Bennett.Tate@epa.gov]
Sent: Friday, March 2, 2018 12:35 PM
To: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: Re: Invitation to Meet

I am available should our standing 8:30 run on time.

> On Mar 2, 2018, at 12:17 PM, Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org> wrote:
>
> Good afternoon,
>
> Jay Vroom from CropLife America asked me to reach out to you to invite you to an hour-long meeting that we are having on Tuesday, March 6 at 9 AM, with Henry Darwin in his offices. A group of our Board of directors and other industry leaders are in town for CLA winter board meeting and they want to meet to discuss a number of issues and EPA processes.
>
> If you are available we would be delighted if you would join us.
>
> MJ
>
> Sent from my iPhone~Please excuse any typos!

Message

From: Ethan Mathews [emathews@croplifeamerica.org]
Sent: 9/29/2017 7:23:43 PM
To: Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, E]
Subject: EPA meetings

Tate -

CLA is interested in attending the smart sectors meeting with the Administrator next week. We are fully supportive of the Agency's regulatory reform plans and would greatly appreciate the opportunity to attend this event.

Ethan Mathews
Director of Government Affairs
CropLife America emathews@croplifeamerica.org

Ex. 6

(o)
(m)

Message

From: Ethan Mathews [emathews@croplifeamerica.org]
Sent: 9/29/2017 7:19:50 PM
To: Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, E]
Subject: Hearing info
Attachments: 9.28.17 Questions - Michael Dourson Nomination Hearing.docx; ATT00001.txt

Tate -

Attached is info CLA is providing to members of the EPW committee in advance of the nominee hearing. We are particularly focused on the PRIA question. Let me know if you want to discuss.

Senate EPW Committee Hearing on the Nomination of Michael Dourson – EPA Assistant Administrator for the Office of Chemical Safety and Pollution Prevention

Wednesday, October 4, 2017, 10:00 AM, Room 406 of the Dirksen Senate Office Building

Preserving the risk-based regulatory model

Dr. Dourson: As you know, the U.S. follows a risk-based model in registration of pesticides – which we also see in the General Agreement on Tariffs and Trade (GATT) – which has proven to be the gold standard for much of the world. However, the European Union has been trending toward hazard-based regulation, in spite of its commitments in GATT and a consensus that the risk-based model is more science-based and protective of human health and the environment. To cite one example, the U.S. has refused to issue a ban on the use of neonicotinoid pesticides (neonics), while the European Commission continues to move in that direction and proposed earlier this year to ban neonics for all applications except greenhouses. To cite another example, the European Commission has taken an approach to registering pesticides (Regulation (EC) No. 1107/2009) that establishes several hazard-based “cut-off” criteria that essentially exclude certain categories of products from consideration, without performing a risk assessment. As you know, such a process is entirely contradictory to the risk-based model that is used in the United States?

Since EPA is the agency responsible for protecting the gold-standard of risk-based rulemaking, please provide your thoughts on how you, as the head of the EPA office that regulates pesticides, will defend that risk-based approach inherent in the agency’s regulatory decisions, domestically as well as on the international stage.

Process fouls, regulation by letter

EPA in recent past has imposed new requirements (for instance, additional label language relating to pollinators) through processes not authorized in the statute – Under your leadership, in what ways can we expect EPA to more strictly follow the law as written by Congress? And if substantial changes are warranted, will you tell us in Congress so WE can change the law, not bureaucrats?

FIFRA sufficiency

After a registrant spends tens of millions (or >100 m) on development, many millions on safety data, submits often times over one hundred studies on the safety of the product, AND goes through FQPA rulemaking (special examination of children’s risks, aggregate risk assessment, etc.) - can EPA actually communicate to the public that this pesticide product will not result in any unreasonable effects to the environment and human health? The Federal Food, Drug and Cosmetic Act says food must be “safe” but EPA seems reluctant to say the word – how will you ensure that EPA appropriately defends Agency decisions?

PRIA/OPP Funding Question

The Pesticide Registration Improvement Act (PRIA) was first enacted in 2003 and established a fee schedule for pesticide registration requests. It lists specific decision time periods for EPA to make a regulatory decision on

pesticide registration and tolerance actions submitted to the Agency. The goal of PRIA was to create a more predictable and effective evaluation system for affected pesticide decisions and couple the collection of individual fees with specific decision review periods. It also promoted shorter decision review periods for reduced-risk applications.

It has been tremendously successful, providing hundreds of millions of dollars in funding to EPA and providing product developers with clarity on timelines for agency actions and facilitating investment in research and development of new products. Importantly, it also has provided \$1 million annually in worker protection and pesticide safety training, funded by industry fees.

PRIA has been reauthorized twice since it was first enacted – in 2007 and 2012 – each time by unanimous consent. It has been supported by large and small manufacturers of agricultural and non-agricultural products, antimicrobial products, biotech companies, and biopesticides, as well as labor and environmental advocates. The current law expires on September 30, 2017. HR 1029, the Pesticide Registration Enhancement Act, which would reauthorize these authorities passed the House on March 20, 2017 and was reported by the Senate Agriculture Committee on June 29, 2017.

What would the impact be to worker protection programs if PRIA is not reauthorized?

Answer:

- The \$1 million annually that goes to program funding for worker protection safety and training – largely in cooperation with State Departments of Agriculture and Cooperative Extension Service -- would cease. Therefore those programs would either have to be funded with other EPA funds (difficult in a time of shrinking budgets), funded by our state partners, or terminated.

What would the impact be to EPA if PRIA is not reauthorized?

Answer:

- The loss of maintenance and registration fees would result in the elimination of 200 full-time-equivalent positions in EPA's Office of Pesticide Programs.
- The authority to collect product maintenance fees expires on 9/30/2017, resulting in an annual loss of resources of \$27.8 million. However, EPA's obligation to conduct registration review continues. Without additional resources, it will be impossible for EPA to comply with the 2022 review deadline.
- New registration applications submitted after 9/30/2017 have no completion deadlines. Companies will face tremendous uncertainty about whether to make new R&D investment in new products.

Pollinators

Science magazine described studies (February 5, 2016 issue) which finally confirmed what beekeepers and the United States Department of Agriculture (USDA) scientists had known for some time; that an invasive Asian bee parasite, which was first found in the U.S in 1987 is considered to be the "single most detrimental pest of honey bees and can magnify the role of viruses in bee health" according to USDA scientists. More evidence turned up when tests were done in Australia, the only major land mass that had not been invaded by those destructor mites. Australian farmers used a wide range of pesticides just like those in the U.S. and yet Australian bee

colonies were healthy and on the rise. Scientists finally figured out how these invasive destructor mite impacted bees. Given the importance of pollinators to agricultural production, Dr. Dourson, will you work to develop policies to control and eventually eradicate the invasive Asian Varroa destructor mites so as to protect the efforts of farmers and beekeepers?

(WICKER) Agriculture is vital to the economy and people of Mississippi. With farming comes crop pests and disease that must be managed. To do that, we need crop protection tools and I regularly hear from farmers that the access to new and innovative products has become more restrictive. Many of these delays and restrictions are due to concerns about honeybees even when the crops are wind pollinated (e.g. corn, cotton, sorghum, soybeans) and bees are not present. This policy is overly precautionary and not risk vs. benefit and has broken down a system of collaboration and friendship between beekeepers and farmers many of which have been in place for decades.

Will you commit to re-evaluating this policy put in place in the last Administration and bring balance and appropriate risk vs. benefit consideration back to the registration process?

ESA

Action is needed to minimize the threat to EPA's pesticide program posed by the federal government's inability so far to effectively integrate the requirements of the Federal Fungicide, Insecticide and Rodenticide Act and the Endangered Species Act. As it stands, the failure to reconcile these two statutes is a threat to US agriculture and is of no benefit to listed species or their habitats. What opportunities do you believe exist to improve these issues and allow the registration of pesticides while simultaneously protecting endangered species and their habitat?

Agricultural productivity

What is the appropriate role for EPA in improving the efficiency of American agriculture and the competitiveness of American agricultural products in world markets?

Public engagement & education on 'Risk'

The characterization of hazards and risks to human health and the environment can be very frightening and confusing for the American public, as well as policy makers. What can EPA do to improve the public understanding of the relative risks of the technologies it is called on to regulate?

Transparency

Transparency is essential to maintaining public trust in the EPA's review and regulation of chemical products. Whether EPA ultimately decides to authorize use of a chemical product or not, it is imperative that Agency decisions be based on sound science and that the review process is as transparent as possible. As Assistant

Administrator, how will you commit to basing regulatory decisions on studies and information that have been made available to the public?

NPDES

(FISCHER) I continue to be concerned about NPDES permit requirements for the application of pesticides to, over and near water. NPDES permits are duplicative and do not add any additional environmental protection beyond those provided via the EPA registration process. To the contrary, NPDES permits negatively impact the ability to protect people from mosquitoes that can vector the Zika Virus and other viruses, to control invasive aquatic plants that contribute to flooding, impede navigation and impact public safety, and many other important uses. As Assistant Administrator will you uphold the rigorous FIFRA pesticide registration process and work with Congress to eliminate these costly and duplicative permits?

Ethan Mathews
Director of Government Affairs
CropLife America
emathews@croplifeamerica.org

Ex. 6

(o) ☐
(m) ☐

Message

From: Fred Bosco [FBosco@croplifeamerica.org]
Sent: 6/12/2017 8:22:49 PM
To: Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, E]
CC: Beau Greenwood [BGreenwood@croplifeamerica.org]
Subject: RE: Comments - Existing regulations - May 15

Uh oh, that's what happens when I read too quickly.
I'll let him know that you're good for Wednesday.
Thank you,
Fred

From: Bennett, Tate [mailto:Bennett.Tate@epa.gov]
Sent: Monday, June 12, 2017 4:19 PM
To: Fred Bosco <FBosco@croplifeamerica.org>
Cc: Beau Greenwood <BGreenwood@croplifeamerica.org>
Subject: Re: Comments - Existing regulations - May 15

Hey! I meant for tomorrow at 5:15 but dovetailing onto weds is good!

On Jun 12, 2017, at 3:56 PM, Fred Bosco <FBosco@croplifeamerica.org> wrote:

Tate,
Unfortunately, Beau is tied up in meetings this afternoon and won't be out until well after 5:15p.
He wanted to let you know that he will join the already-scheduled CLA-EPA meeting on Wednesday at 2pm with Nancy and hopes that you will join as well.

Thank you,
Fred

Fred Bosco
Government Relations Coordinator
CropLife America
1156 15th Street NW, Suite 400
Washington, D.C. 20005
P: **Ex. 6** F: 202-355-1411
E: FBosco@croplifeamerica.org
W: www.croplifeamerica.org

From: Bennett, Tate [mailto:Bennett.Tate@epa.gov]
Sent: Monday, June 12, 2017 12:56 PM
To: Beau Greenwood <BGreenwood@croplifeamerica.org>
Subject: RE: Comments - Existing regulations - May 15

Beau-

I know this sounds way too late in the day to be discussing this, but is 5:15 tomorrow evening at EPA a good time to meet with Nancy and I on this? We can keep it short!

Tate

From: Beau Greenwood [<mailto:BGreenwood@croplifeamerica.org>]

Sent: Friday, June 9, 2017 6:14 PM

To: Bennett, Tate <Bennett.Tate@epa.gov>

Subject: Fwd: Comments - Existing regulations - May 15

Hi Tate. Attached are industry and grower comment letters submitted on May 15 that speak to worker protection and certification and training rules. This would be a good place for us to begin a conversation on this and other related matters.

Hope to see you next week.

Beau.

Beau Greenwood
Executive Vice President
CropLife America
Washington, DC

Begin forwarded message:

From: "Fred Bosco" <FBosco@croplifeamerica.org>

To: "Beau Greenwood" <BGreenwood@croplifeamerica.org>

Subject: Comments - Existing regulations - May 15

Thank you,
Fred

Fred Bosco
Government Relations Coordinator
CropLife America
1156 15th Street NW, Suite 400
Washington, D.C. 20005
P: Ex. 6 F: 202-355-1411
E: FBosco@croplifeamerica.org
W: www.croplifeamerica.org

Message

From: Fred Bosco [FBosco@croplifeamerica.org]
Sent: 6/12/2017 7:55:49 PM
To: Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, El]; Beau Greenwood [BGreenwood@croplifeamerica.org]
Subject: RE: Comments - Existing regulations - May 15

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Fred

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Washington, D.C. 20005
P: Ex. 6 F: 202-355-1411
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From: Beau Greenwood [mailto:BGreenwood@croplifeamerica.org]
Sent: Friday, June 9, 2017 6:14 PM
To: Bennett, Tate <Bennett.Tate@epa.gov>
Subject: Fwd: Comments - Existing regulations - May 15

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Beau.

Beau Greenwood
Executive Vice President
CropLife America
Washington, DC

Begin forwarded message:

From: "Fred Bosco" <FBosco@croplifeamerica.org>
To: "Beau Greenwood" <BGreenwood@croplifeamerica.org>
Subject: Comments - Existing regulations - May 15

Thank you,
Fred

Fred Bosco
Government Relations Coordinator
CropLife America
1156 15th Street NW, Suite 400
Washington, D.C. 20005
P: Ex. 6 **F:** 202-355-1411
E: FBosco@croplifeamerica.org
W: www.croplifeamerica.org

From: Washington Ag Communicators [fpurcell@croplifeamerica.org]
Sent: 6/12/2017 1:47:03 PM
To: Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, E]
Subject: RSVP today! Washington Ag Communicators Networking Reception

[View in browser](#)



YOU'RE INVITED TO A

PROFESSIONAL MEET & GREET

HOSTED BY THE
WASHINGTON AG COMMUNICATORS

DATE: JUNE 14
TIME: 5:30PM - 7:30PM
VENUE: CAPITOL VISITOR CENTER
ROOM SVC 209-08

LIGHT BITES AND BEVERAGES PROVIDED
MUST RSVP TO ATTEND

All communications staffers are invited to join D.C. agriculture communicators for an evening of networking, food and drink! Leave the

policy at the office and come to find out where to find resources when constituents reach out to you with agriculture related questions. Event is invite only.

Please respond by clicking Yes or No. We look forward to your response!

Your hosts:

CropLife America
National Milk Producers Federation
The Fertilizer Institute
National Corn Growers Association
Farm Credit Council
International Dairy Foods Association
American Frozen Food Institute
White House Writers Group
BIO
Ducks Unlimited
United Egg Producers
American Seed Trade Association
Food Marketing Institute
American Farm Bureau Federation
Agriculture Retailers Association
Crop Insurance and Reinsurance Bureau (CIRB)
National Association of Wheat Growers
USA Rice
American Soybean Association
Farm Journal Foundation
Look East Communications
National Cotton Council

[Unsubscribe](#) | [Opt Out](#)

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Message

From: Beau Greenwood [BGreenwood@croplifeamerica.org]
Sent: 6/9/2017 10:13:32 PM
To: Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, E]
Subject: Fwd: Comments - Existing regulations - May 15
Attachments: CropLife America Comments on Evaluation of Existing Regulations signed.pdf; ATT00001.htm; EPA-HQ-OA-2017-0190 PPC Comments re Regulatory Reform.pdf; ATT00002.htm; EPA-Final17.0515 AFBF et al.pdf; ATT00003.htm

Hi Tate. Attached are industry and grower comment letters submitted on May 15 that speak to worker protection and certification and training rules. This would be a good place for us to begin a conversation on this and other related matters.

Hope to see you next week.

Beau.

Beau Greenwood
Executive Vice President
CropLife America
Washington, DC

Begin forwarded message:

From: "Fred Bosco" <FBosco@croplifeamerica.org>
To: "Beau Greenwood" <BGreenwood@croplifeamerica.org>
Subject: Comments - Existing regulations - May 15

Thank you,
Fred

Fred Bosco
Government Relations Coordinator
CropLife America
1156 15th Street NW, Suite 400
Washington, D.C. 20005
P: Ex. 6 | **F:** 202-355-1411
E: FBosco@croplifeamerica.org
W: www.croplifeamerica.org



May 15, 2017

U.S. Environmental Protection Agency
Office of Regulatory Policy and Management
1200 Pennsylvania Ave, N.W.
Mail Code 1803A
Washington, D.C. 20460-0001

Submitted via www.regulations.gov; Docket ID: EPA-HQ-OA-2017-0190

Re: Evaluation of Existing Regulations

To whom it may concern:

CropLife America (CLA) appreciates the opportunity to submit these comments in response to the request for input, published in the Federal Register on April 13, 2017 by the United States Environmental Protection Agency (EPA or the Agency), seeking input on regulations that may be appropriate for repeal, replacement, or modification. The request for input references the February 24, 2017 Executive Order 13777, "Enforcing the Regulatory Reform Agenda."

CLA is the national trade association that represents the manufacturers, formulators and distributors of pesticides in the United States. CLA's member companies produce, sell and distribute virtually all the vital and necessary crop protection and biotechnology products used by American farmers, ranchers and landowners.

CLA recognizes the burden placed on American industry and agriculture by unnecessary, duplicative, or over-complicated regulations, no matter how well-intentioned. We support efforts to streamline and return common sense to the regulatory process. We also recognize, however, that the opportunities for reform are many and that a prudent approach to determining how best to meet these challenges will help us achieve our goals with minimum disruption to ongoing activities.

Many industries, including our own, depend on a predictable, science-based regulatory process to allow products to reach their intended customers – in our case, American farmers, ranchers and landowners – in a timely fashion. CLA's members' products must be registered (licensed) by the Agency, for use on food crops. This registration process must also establish "tolerances" for residues on those crops - regulations promulgated under the Federal Food, Drug, and Cosmetic Act (FFDCA). Our members support these regulatory actions, in part, through a user-fee program. American farmers and the entire food chain depend on this regulatory system to ensure that pesticides are used in a manner that is safe for food production and the environment.

Background. As the Agency is aware, pesticides protect the world's food supply, infrastructure, and public health from pests, weeds, and diseases. Farmers cannot grow enough food to feed the

Representing the Crop Protection Industry

1156 15th St. N.W., Suite 400 Washington, D.C. 20005 • 202.296.1585 phone 202.463.0474 fax www.croplifeamerica.org

ED_002061_00068621-00001

world's population on existing farmland without the ability to control weeds, plant diseases, insects, and other pests. Pesticides play important roles in public health and safety, as well. They protect the public from mosquito- and tick-borne illnesses, and antimicrobial pesticides protect against deadly microorganisms. More familiar to many consumers, pesticides protect homes and other structures from cockroaches and rodents, and keep yards, parks, and playgrounds free of weeds and other pests.

The Agency closely regulates the use of pesticides in the United States. No one may sell or distribute a pesticide product without first submitting a registration application to EPA's Office of Pesticide Programs (OPP). Following the industry investment in a decade or more of effort and hundreds of millions of dollars in research and development costs, OPP scientists evaluate each pesticide to ensure that it will not pose unreasonable adverse effects to human health or the environment, pursuant to its authority granted under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). As mentioned above, EPA grants a license or "registration" for pesticides that pass EPA's rigorous evaluations. The registration permits a pesticide product to be sold, distributed, and used in accordance with its EPA-approved label.

For pesticides used on food crops, the FFDCA also requires EPA to set tolerances through rulemaking for the legal limit of pesticide residue that may remain in or on each food or feed commodity harvested from a treated crop. In setting a tolerance, EPA makes a safety determination that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue ..." The FFDCA includes strong provisions for protecting infants and children, as well as other sensitive subpopulations.

A timely, predictable process for the pesticide registration process and tolerance rulemaking supports American manufacturing and agriculture by allowing growers predictable access to crop protection tools made by American companies. Registrations and tolerances help assure consumers in both the United States and other countries that food grown by American farmers is safe to eat.

Congress has repeatedly affirmed the need for a streamlined approval process for pesticide registrations funded in part by registration and user fees. The Pesticide Registration Improvement Act (PRIA) and subsequent iterations require that EPA make a registration determination on a manufacturer's pesticide application within the time specified in the PRIA statute. Similarly, for pesticides to be applied on food crops, PRIA sets timelines for EPA to make tolerance decisions.

Comments. We support the mission and purpose of OPP in its work on the processes outlined above. OPP serves as both a regulator and a licensing agency, whose goal is to fairly assess whether a given pesticide product can be properly labeled for its intended use with no unreasonable adverse effects. EPA's registration and label instructions represent the objective, risk-based standard that assures the public that lawful crop protection tools are available and meet the applicable standards.

Notwithstanding the regulated community's support for OPP's mission, the Agency is in serious need of reset to preserve risk-based regulation for pesticides based on sound science and a

predictable regulatory process. Most urgently, CLA encourages the Administration to provide thorough, thoughtful review of OPP with scrutiny of departures from established policy, due process, and sound science that occurred in recent years. Lapses in EPA's risk assessment process (timing for registration and registration review) have threatened not only the effectiveness, but availability of a robust toolbox of crop protection products for American farmers, ranchers and landowners.

Resetting the process and science, and restoring transparency and predictability to the registration and review of pesticides, will resolve many product- and issue-specific concerns.

We also are very concerned about recent attempts to create policy without appropriate notice and public comment, using less formal and less transparent means instead.

Although not an exhaustive list, the following specific recommendations are deserving of action and oversight:

- **Reauthorize PRIA** - OPP is uniquely situated among the other offices within EPA in that it serves the critical function of reviewing and registering pesticides for the private sector – providing verification that a pesticide meets EPA's registration standards. To ensure a robust foundation for OPP's proper operation, CLA asks that the Administration support reauthorization of PRIA. This program is the private-sector-funded fee-for-service system that provides OPP a portion of the resources needed to complete timely pesticide registrations, and provides registrants business certainty and regulatory predictability, allowing proven and new technologies to reach pesticide users more quickly.
- **Develop Meaningful Endangered Species Act Reform** - We can do better when it comes to the proper implementation of the Endangered Species Act (ESA). The pervasive misapplication of the ESA across the regulated business spectrum and the ongoing dysfunctional working relationships among OPP, the Fish and Wildlife Service, and the National Marine Fisheries Service continue to frustrate the harmonization of ESA and FIFRA.
- **Restore Process and Science, Use Input Provided by the United States Department of Agriculture (USDA)** - Certain pending actions and recent policies are not consistent with the underlying science, or do not comply with the Agency's principles of transparency, or are otherwise not fully developed. These actions should be delayed until the policies are fully developed and the underlying science is determined to be reliable as the basis of decision-making. It is critically important that USDA's expertise and advice be meaningfully incorporated into all actions. An Executive Order that delays certain OPP actions until proper process and sound science are sorted out and restored could be helpful in this regard.
- **Zika Funding** - CLA urges the Administration to budget funding to states to support pest control operations and to support development of technology and products to deal with the Zika virus and its mosquito vectors. Surveillance and control of mosquitos is as important as vaccine development.

Other issues of concern such as the Waters of the United States (WOTUS) Rule are outlined in comments to this docket made by the Pesticide Policy Coalition and the American Farm Bureau Federation, both of which we incorporate here by reference and fully support.

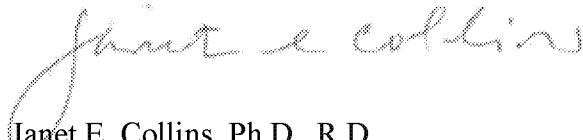
CropLife America believes that we can achieve our national environmental goals, including preservation and enhancement of biodiversity in agricultural landscapes, while maintaining and improving agricultural productivity, but to do so, we need effective, science-based federal policy.

The work done by OPP is critical to protect the environment, while serving the needs of America's farmers, ranchers, landowners, and consumers. CLA is proud to support that work. However, improvements can be made to provide greater clarity, greater reliance on sound science, and greater certainty for agriculture, the regulated community and other stakeholders. This will benefit farmers and ranchers across the country, as well as CLA's members with domestic manufacturing facilities. CLA would be pleased to provide greater detail on these issues and to discuss these matters more fully.

Should you have any questions or wish to discuss this matter, please contact me directly by email (jcollins@croplifeamerica.org) or telephone (+ Ex. 6).

Thank you for your consideration of these comments.

Respectfully,



Janet E. Collins, Ph.D., R.D.
Executive Vice President, Science and Regulatory Affairs

May 15, 2017

U.S. Environmental Protection Agency
Washington, D.C. 20004

RE: Docket EPA-HQ-OA-2017-0190

The undersigned organizations commend the Environmental Protection Agency [the agency] for opening this docket and are pleased to submit the attached comments in response to the agency's request.

Our organizations represent individuals engaged in agricultural production, both for crops and livestock. Requirements imposed by the agency through its regulations can have significant impacts on our members; many of these impacts can be felt in the areas outlined by the agency for review¹ In the attached comments, we have sought to meet the agency's request to be as specific as possible. In some instances, where information responsive to the agency's request for "supporting data or other information such as cost information" is not available, we have attempted to quantify the impact of the regulatory burden as concretely as possible and to "provide specific suggestions regarding repeal, replacement or modification." We welcome questions from your office or the Task Force if these comments need further amplification and will do our best to respond in as prompt and comprehensive a manner as possible. We greatly value this effort and hope the agency succeeds in alleviating unnecessary and costly regulatory burdens on the agriculture community.

In this context, we wish to make a brief preparatory remark. As of mid-May, the docket exceeded 17,000 comments, the overwhelming majority of them anonymous. These are presumably submitted from well-intentioned individuals but they preponderantly assume that the agency's initiative is to undo, weaken, rescind or otherwise impair the nation's environmental safeguards. We see nothing in the Federal Register notice that supports such an inference. We wish to state for the record that the undersigned organizations are not requesting that the agency engage in, nor would we expect the agency to pursue, an effort to impair, rescind, weaken or in any way retreat from health or environmental safeguards that have been authorized by Congress. Nothing in Executive Order 13777 would have the agency ignore its statutory obligations to administer the environmental laws Congress has passed. We are not asking the agency to weaken its commitment to health and the environment. We have identified regulatory obligations that can be modified or repealed consistent with the laws Congress has enacted and we strongly encourage the agency to consider these recommendations.

¹ In its notice, EPA has specifically asked for recommendations that address regulations that, *inter alia*, "(i) eliminate jobs, or inhibit job creation; (ii) are outdated, unnecessary, or ineffective; (iii) impose costs that exceed benefits; (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard or reproducibility..."

We appreciate your consideration of these comments. If you have questions or wish to discuss any specific issue in this submission, please contact Paul Schlegel at the American Farm Bureau Federation at Ex. 6 or pauls@fb.org.

Sincerely,

Agri-Mark Dairy Cooperative, Inc.
American Dairy Coalition
American Farm Bureau Federation
AmericanHort
American Soybean Association
American Sugarbeet Growers Association
American Sugar Cane League
California Specialty Crops Council
Dairy Cares
Dairy Farmers of America
Dairy Producers of New Mexico
Dairy Producers of Utah
Exotic Wildlife Association
Federal Forest Resource Coalition
GROWMARK, Inc.
Idaho Dairymen's Association
Missouri Dairy Association
National All-Jersey
National Aquaculture Association
National Association of State Departments of Agriculture
National Association of Wheat Growers
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Council of Agricultural Employers
National Council of Farmer Cooperatives
National Peach Council
National Pork Producers Council
National Milk Producers Federation
National Sorghum Producers
National Turkey Federation
Northeast Dairy Farmers Cooperatives
Panhandle Peanut Growers Association
Professional Dairy Managers of Pennsylvania
Select Milk Producers, Inc.
Society of American Florists
South East Dairy Farmers Association
Southwest Council of Agribusiness
St. Albans Cooperative Creamery

Upstate Niagara Cooperative, Inc.
US Apple Association
USA Rice
US Cattlemen's Association
Washington State Dairy Federation
Western Peanut Growers Association
Western United Dairymen

I. **‘Waters of the US’ (WOTUS) Rule (80 Fed. Reg. 37054, June 29, 2015)**

On February 28, President Trump signed Executive Order 13778 directing EPA to review the WOTUS rule and to publish a proposal rescinding or revising it. We strongly support the President’s EO and urge EPA to pursue this effort aggressively.

Recommendation: We recommend that the agency:

- (a) repeal the existing rule (80 Fed. Reg. 37054).
- (b) in a separate rulemaking, propose a revised rule that more closely adheres to the language of the Clean Water Act and Supreme Court decisions in *Riverside Bayview*, *SWANCC* and *Rapanos*.

II. **Spill Prevention Control and Countermeasures (SPCC) Rule (40 CFR 112)**

While EPA attempted to address concerns of the agriculture community raised by the SPCC rule, the program presents nearly insurmountable difficulties for agricultural producers. That assessment is borne out by the agency’s own Regulatory Impact Analysis (RIA). EPA examined the Clean Water Act violation data from 2001 to 2006. In over 10,000 violations in that time period, only 292 involved oil spills of any type, and only **one** of those involved a farm. Many other estimates in the RIA were incorrect as well. EPA estimated an approximate figure of 152,000 affected farms based on USDA numbers. Nowhere did EPA mention the USDA numbers presented in the 2005 round of proposals that numbered potentially affected farms closer to 400,000. Yet despite these facts, EPA moved to place a costly and burdensome rule on the agricultural industry with no data to show a risk justifying the cost. EPA included other incorrect assumptions to bolster the cost-savings analysis. They estimated a savings of \$3.6 million due to exempting pesticide application equipment but that cost was only based on a report from one state. They estimated \$2,000+ savings from not regulating home heating oil tanks but those tanks were exempted in the original 1973 rule and no one has ever applied SPCC to those tanks anyway. While Congress granted the agency flexibility to address any concerns on farms, the agency rejected this approach and imposed the strictest limit possible.

Recommendation: The SPCC for farms should be repealed.

III. **CERCLA/EPCRA**

- (a) On April 11, 2017 the US Court of Appeals for the DC Circuit issued a ruling in long running litigation that struck down a 2008 rule providing an exemption from federal reporting of emissions from livestock farms and providing a partial exemption from state/local reporting of such emissions. As a result of the DC Circuit ruling, in late May or early June 2017 livestock farmers will be responsible for calculating the rate of various chemical emissions associated with the storage of manure for use as a fertilizer, and treat and report these emissions as “emergency releases” to state and local authorities under 42 U.S.C. § 11004 (EPCRA § 304) and to the Coast Guards National

Response Center under 42 U.S.C. § 9603 (CERCLA § 103). These reports provide little emergency planning/response benefit to regulators or the public, and in fact could have a detrimental impact on emergency response programs (and the public's reliance on them) because the receipt of hundreds of thousands of reports of livestock odor will overwhelm a system designed for responding to true emergencies. Failure to file the reports will subject livestock farmers to expensive citizen suit litigation filed by eco and animal rights activists.

- (b) In recent years, efforts have been made to extend the liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 and the Emergency Planning and Community Right-To-Know Act (EPCRA) of 1986 to livestock and poultry operations for emissions or discharges from manure produced in those operations. Animal agriculture operations are already regulated under the Clean Water Act, the Clean Air Act, and various state laws to protect the environment; these statutes provide for permitting, enforcement and, if needed, remediation. Manure is not a superfund waste and was not intended by Congress to be regulated as such.

Recommendation: EPA should promulgate regulations confirming that manure is not regulated under CERCLA or EPCRA.

IV. **Worker Protection Standards (WPS) rule (40 CFR Part 170)**

- (a) Designated Representative. In the WPS rule promulgated November 2, 2015, EPA included a provision that permits anyone claiming to be a 'designated representative' (DR) to gain access to a farmer's proprietary records relating to pesticide use.² This provision provides farmers with no protection from fraudulent or counterfeit claims; does not assure that records released by the farmer will actually be shared with workers; and imposes no constraints on what DR's may do with documentation once it is obtained. EPA has never cited any data or facts that demonstrate that such a provision would improve worker safety. Thus, the regulation imposes an unnecessary regulatory burden and cost, while exposing farmers to legal liability, with no discernible benefit.

Recommendation: EPA should repeal 40 CFR § 170.311(b)(9) and related provisions.

- (b) Application Exclusion Zone (AEZ). In the final WPS, EPA inserted a final articulation of the Application Exclusion Zone (AEZ) that unduly burdens state agencies and the regulated community.³ As finalized, the AEZ goes beyond the Agency's stated intent

² The specific requirement is at 40 CFR 170.311(b)(9).

³ WPS provision at 170.405(a)(1) establishes the applicable AEZ distances, and WPS provision 170.405(a)(2) establishes a requirement for the agricultural employer not to allow any worker or other person in the AEZ within the boundaries of the establishment until the application is complete. Provision at 170.505(b) establishes a requirement for the handler to suspend the application if any worker or other person is anywhere in the AEZ. Thus,

to create a one-hundred foot buffer surrounding the application equipment that, according to the regulations now in place, extends beyond the agricultural establishment, arguably jeopardizing a grower's ability to manage all his land and prohibiting appropriate pest mitigation activities if there is any kind of structure, permanent or otherwise, inhabited or vacant within one hundred feet of the agricultural establishment. Furthermore, any individual, structure, or a passing vehicle within one hundred feet of the property can effectively cease the grower's application activity. After the final rule was promulgated, EPA's Office of General Counsel (OGC) was working to issue interpretive guidance clarifying the Agency's intent under the final regulation; however, Agency guidance does not carry the weight and authority of a codified federal regulation and does not provide the necessary clarity to assist state regulatory agencies or the grower community with compliance and enforcement activities. In short, both EPA and the state regulatory agencies are still uncertain on how to enforce or deliver compliance assistance on the AEZ.

Recommendation: EPA should revoke the Application Exclusion Zone (AEZ), which goes beyond EPA's original intent and creates an unworkable and unenforceable provision that does not provide any additional regulatory protections beyond those already required under law.

V. **Resource Conservation and Recovery Act**

In 1979, EPA promulgated regulations that reflect Congress' intent that the agency not regulate manure or crop residue under the Solid Waste Disposal Act (42 U.S.C. § 6903(27)). Certain court decisions, however, have injected uncertainty in this area of the law. Legislation is now pending in Congress (the Farm Regulatory Certainty Act) to provide legal certainty for farmers.⁴ The legislation would also amend Section 7002 of the Solid Waste Disposal Act (42 U.S.C. § 6972(b)(1)) to clarify that farmers are not to be targeted twice if they are engaged in legal action with a federal or state regulatory entity to address identified issues.

Recommendation: EPA should continue its policy of not regulating agricultural nutrients under RCRA. The EPA also should vigorously defend existing regulatory actions should a farming operation be targeted with a third-party lawsuit for an alleged violation that is already being addressed by a federal or state legal or administrative proceeding.

VI. **“Normal farming” activities under § 404(f) of the Clean Water Act (33 CFR § 323.4)**

Sec. 404(f)(1) of the Federal Water Pollution Control Act (33 U.S.C. § 1344(f)(1)) provides an exemption from 404 “dredge and fill” permitting for a wide range of normal farming,

the AEZ goes beyond the boundaries of the establishment in question and applies to any area on or off the establishment within the AEZ while the application is ongoing.

⁴ The Farm Regulatory Certainty Act would amend Section 1004(27) of the Solid Waste Disposal Act to codify EPA's existing regulations.

ranching and silviculture activities, including plowing, seeding, cultivating, harvesting for the production of food, fiber, and forest products as well as construction or maintenance of farm or stock ponds or irrigation ditches and for the maintenance of drainage ditches. Even though this broad language is written in the statute, the Corps' regulation (33 CFR § 323.4) and EPA's and the Corps' guidance and information interpretations have narrowed the scope of 'normal' farming, ranching and silviculture activity.⁵ Thus, even some explicitly exempt activities (i.e., plowing) have come under enforcement action. Congress has included appropriations riders directing EPA and the Corps to eliminate funding for the so-called "recapture" provision at Sec. 404(f)(2), which the agencies use to sweep otherwise exempt activities back into the regulatory program, yet EPA and the Corps have ignored Congress' directives.

Recommendation: EPA and the Corps should undertake a rulemaking that supersedes the Corps' existing regulation as well as prior guidance from the agencies and codifies the normal farming, ranching and silviculture exemption under § 404(f)(1) of the Clean Water Act consistent with the text of the statute.

VII. **Total Maximum Daily Loads (TMDLs) (40 CFR Part 130)**

EPA has used guidance and informal interpretation of sparse statutory text (Clean Water Act Sec. 303(d)) and ambiguous decades-old regulations to create a regulatory mechanism that puts EPA bureaucrats and technocrats in the role of land use planners. This has blurred the lines of authority between the Federal and state governments and robbed state environmental agencies of the ability to devise and adapt their own plans to most effectively and efficiently achieve water quality standards. This EPA overreaching raises the cost of achieving water quality goals, inhibits adaptive management and unlawfully puts EPA in the role of regulating farming practices. EPA's existing rules also fail to ensure that established water quality goals are in fact *achievable* before burdensome or even economy-breaking implementation measures are imposed. This is of particular concern where water quality impairment results largely from naturally occurring "pollutants."

Recommendations: EPA should revise its TMDL regulations to provide clarity and certainty to the regulated community and state and local governments by assuring that:

- (a) States, not EPA, have the authority to set pollutant "allocations" for waters within their borders and incorporate the allocations into state implementation plans. This provides states and localities with the flexibility they need to change allocations when needed.
- (b) EPA's TMDL authority is limited to approving or setting the *total* maximum load for a particular pollutant, as required by the statutory term "*total* maximum daily load."

⁵ For example, while the Act itself does not restrict the exemption, the agency has seemingly used the recapture provision in 404(f)(2) to claim that the exemptions for normal activities only apply to 'established, ongoing' operations. It has further extended this interpretation to claim that changing an operation from one agricultural activity (e.g., grazing cattle) to another (e.g., planting, cultivating and harvesting crops) constitutes a 'change in use' and therefore negates the exemption provided in the law. See [https://efotg.sc.egov.usda.gov/references/public/NM/CWA_404\(f\)_Ag_Exemptions.pdf](https://efotg.sc.egov.usda.gov/references/public/NM/CWA_404(f)_Ag_Exemptions.pdf)

VIII. **Prior Converted Cropland (33 CFR § 328.3(b))**

In 1993, EPA and the Army Corps of Engineers promulgated a regulation that clarified that wetlands converted before 1985 into farmland were ‘prior converted croplands’ (PCC) and therefore, not “waters of the US.” The preamble to the rule clearly provided that land remains as PCC regardless of the use to which the land is put. Yet, in 2005, the Army Corps of Engineers issued guidance eroding this exemption by proclaiming that land is no longer PCC if it is put to a non-agricultural use. A federal court found the guidance is unlawful because it conflicts with the 1993 rule,⁶ but the Corps ignored the court’s decision and continues to implement the guidance in order to re-regulate land.

Recommendation: EPA should undertake a rulemaking to clarify the 1993 rule that PCC lands are not subject to CWA regulation as jurisdictional wetlands regardless of the use to which the land is put.

IX. **Army Corps of Engineers 1987 Wetlands Delineation Manual and Regional Supplements**

In 1993, Congress prohibited the U.S. Army Corps of Engineers from using appropriated funds to delineate wetlands under the 1989 Wetlands Delineation Manual.⁷ Congress further stated that no funds shall be used to implement *any subsequent manual adopted without the public notice and comment* procedures of the Administrative Procedure Act (APA). In the meantime, Congress authorized the Corps to use the 1987 Wetlands Delineation Manual, but only until the adoption of a final delineation manual.

Almost 25 years later, the Corps has failed to propose, much less adopt, a final wetlands delineation manual. Instead, the Corps continues to use the 1987 Manual, adding regional “supplements” to modify the very same delineation criteria Congress disallowed in 1993. Rather than placing the Manual and regional supplements through the rulemaking process, the Corps has used the supplements to avoid the Congressional directive to formally promulgate a final Manual.

Recommendation: We recommend that EPA clarify that no regional supplements should be used in making determinations of what constitutes “navigable waters” and/or initiate a joint

⁶ *New Hope Power Company and Okeelanta Corporation v. U.S. Army Corps of Engineers and Stockton* 2010 WL 3834991 (S.D. Fla. September 29, 2010)

⁷ See Energy and Water Development Appropriations Act, Pub. L. No. 102-377, 106 Stat. 1315: “None of the funds in this Act shall be used to identify or delineate any land as a “water of the United States” under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 or any subsequent manual adopted without notice and public comment. Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991, until a final wetlands delineation manual is adopted. PUBLIC LAW 102-377—OCT. 2, 1992 106 STAT. 1325 None of the funds in this Act shall be used to finalize or implement the proposed regulations to amend the fee structure for the Corps of Engineers regulatory program which were published in Federal Register, Vol. 55, No. 197, Thursday, October 11, 1990.”

rulemaking with the Corps that subjects the wetlands delineation manual through the rigors and transparency of the APA's public notice and comment process.

X. EPA's proposed revision regarding objection to administratively continued permits (40 CFR § 123.44) (Docket ID No. EPA-HQ-OW-2016-0145c)

EPA has proposed granting to itself the power to object to administratively continued permits by providing EPA Regional Administrators the discretion to change the status of an administratively continued permit to "proposed permit," an outcome that would trigger the robust federal review process outlined in 81 Fed. Reg. 31344, 31372 (May 18, 2016).

This proposed revision marginalizes a valuable tool afforded to states with authorized NPDES permit programs – the ability to administratively continue an existing NPDES permit in lieu of permit reissuance. This tool is important because it allows states to prioritize limited resources and limited personnel to ensure the most efficient management of their state NPDES program. This revision, if finalized, further erodes State authority to manage their own programs and will discourage unauthorized states from assuming NPDES authority.

Denial of an administratively continued permit, which this rule revision entails, would leave agricultural producers who hold NPDES permits without permit coverage and vulnerable to citizen lawsuits. It also raises a constitutional concern due to the lack of due process considerations given that there is no procedure to challenge the EPA's decision to change a permit's status to "proposed." The revision raises additional concern because it exceeds EPA's statutory authority. Clean Water Act § 402(d) grants EPA the authority to review proposed permits and to object to them, which if objected to prohibits the permit from issuing. The revision here would replicate this administrative power and apply it to administratively continued permits, a step that goes beyond the power Congress granted to EPA in the Clean Water Act.

Finally, this effort by EPA is not needed because EPA already manages a largely successful effort that resolves the underlying issue. The Priority Permit Measure provides an avenue for EPA to target state-issued NPDES permits to undergo the reissuance process by designating them as "priority permits".

Recommended: EPA withdraw its proposed revision regarding objection to administratively continued permits (40 CFR § 123.44) (Docket ID No. EPA-HQ-OW-2016-0145c)

XI. National Ambient Air Quality Standards (NAAQS) for Coarse Particulate Matter (PM₁₀)

The NAAQS and definition for coarse particulate matter are overly broad and do not take into account naturally occurring sources like dust found on farms.

Recommendation: EPA should clarify its NAAQS regulations to ensure that agricultural producers are not found to be in violation of the Clean Air Act for conditions beyond their control when operating under general farming practices.



PPC

PESTICIDE POLICY COALITION

A Coalition Working for Sound Pest Management Policies

May 15, 2017

U.S. Environmental Protection Agency
Office of Regulatory Policy and Management
1200 Pennsylvania Ave. NW.
Mail Code 1803A
Washington, D.C. 20460-0001

Submitted via Federal eRulemaking Portal

Re: Evaluation of Existing Regulations; Docket ID No. EPA-HQ-OA-2017-0190

The Pesticide Policy Coalition (PPC or “the Coalition”) is pleased to submit comments to the U.S. Environmental Protection Agency (EPA) on its evaluation of existing regulations in accordance with Executive Order (EO) 13777, Enforcing the Regulatory Reform Agenda.

PPC is an organization of food, agriculture, forestry, pest management and related industries that support transparent, fair and science-based regulation of pest management products. PPC members include: nationwide and regional farm, commodity, specialty crop, and silviculture organizations; cooperatives; food processors and marketers; pesticide manufacturers, formulators and distributors; pest-and vector-control operators; research organizations; and other interested stakeholders. PPC serves as a forum for the review, discussion, development and advocacy around pest management regulation and policy.

COMMENTS

The following comments refer to the regulations and policies PPC has identified as top candidates for regulatory reform actions, including modifications, replacement and/or elimination of specific regulations, or requirements within those rules. These recommended reforms will further the Administration’s goals set forth in the EO of

eliminating regulatory requirements that inhibit job growth, impose burdensome costs that exceed environmental benefits, are unnecessary and ineffective, or are not substantiated by available data or are inconsistent with the data guidelines implementing the Information Quality Act.

I. Modifications and Revisions

A. Certified Applicator and Training Rule (82 Fed. Reg. 952).

The previous Administration recently finalized a regulation on certification and training of applicators of restricted use pesticides (RUPs). The responsibility of administering pesticide applicator certification programs rests solely with state, tribal and territorial authorities. EPA would not be able to effectively implement the program without this federal-state partnership. The certification and training rule brings a number of significant changes and increased certification requirements with which applicators must now comply, and state certifying authorities must implement in their respective state certification plans. The final rule underestimates the time and cost to overhaul state certification programs. Implementation of the rule is a resource-intensive process, and in some states will require legislative actions. Among other changes, the new rule sets a new minimum age requirement for commercial RUP applicators at 18 years. Prior to the new rule, individuals under the age of 18 could apply RUPs if they met certification and training requirements. No health or environmental risk or rationale is provided to justify or support such change. Further, several states allow individuals under 18 to apply RUPs. Implementation of the new age limit will require many of those states to pursue legislative action to amend applicable state law without any benefit to public health or the environment.

Faced with a largely unfunded federal mandate, and limited resources, some state legislatures could recommend returning the program to EPA. EPA does not have the capacity to run programs of the same scale, depth and caliber as do the state and local partners. Any loss of state/local partnerships would result in a significantly pared down program and potential increased risks to public health and the environment.

The PPC recommends that EPA modify the rule to eliminate the minimum age requirement. Absent the federal requirement, individual states are free to set age requirements at the state level, and the removal of this requirement will alleviate the need for state legislative actions in several states. The PPC also recommends that EPA delay implementation of the final rule and work with state authorities to identify a realistic implementation timeline to provide flexibility to account for states' resource concerns and needs.

B. Agricultural Worker Protection Standard (80 Fed. Reg. 67496)

Promulgated in November 2015, EPA's new worker protection standard (WPS) for agricultural workers increased the frequency of required training, added recordkeeping requirements and introduced new concepts, including the "application exclusion zone" and "designated representative." Most of the new standard's requirements became effective in January 2017, in spite of a petition filed by groups representing farmers and state departments of agriculture requesting a delay to provide adequate time for implementing the changes. EPA failed to provide state lead agencies with enforcement guidance and training materials, and resources necessary to effectively implement the rule ahead of the effective date and to assist farmers and ranchers with compliance.

The PPC remains concerned about the concept of a "designated representative." Farmers and ranchers are entitled to a reasonable expectation of privacy in their businesses; this provision in the rule could result in disclosure of confidential and proprietary information, and also subject farmers to harassment and unfair criticism for the lawful and safe use of EPA-approved pesticides on their properties. EPA has not provided any assurance to growers that fraudulent requests by designated representatives will not expose them to legal liability, nor has EPA taken steps to limit disclosure of proprietary farm data to unrelated third parties. At no time has EPA brought forth evidence demonstrating that the provision would result in greater worker safety. The PPC urges the Task Force to recommend a revision of the WPS to eliminate or revise this "designated representative" provision to restore reasonable privacy protections for farmers and ranchers.

The Coalition also recommends that EPA amend the final WPS rule to eliminate the Application Exclusion Zone (AEZ). The AEZ created a one-hundred foot buffer surrounding the application equipment that, according to the regulations now in place, extends beyond the agricultural establishment. The AEZ prohibits pest mitigation activities if there is any kind of structure, permanent or otherwise, inhabited or vacant within one hundred feet of the agricultural establishment. Additionally, any individual, structure, or a passing vehicle within one hundred feet of the property can effectively cease the grower's application activity. This provision unduly burdens state agencies and grower without any additional regulatory benefits. Subsequent to finalization of the WPS rule, EPA's Office of General Counsel was working to issue interpretive guidance clarifying the EPA's intent under the final regulation. Guidance does not carry the weight and authority of a codified federal regulation and does not provide the necessary clarity for state agencies tasked with compliance and enforcement activities, and regulatory certainty for farmers and pesticide applicators. The PPC recommends modifying the final WPS rule to remove the AEZ provision.

Finally, in order for states and local authorities to implement the final rule, and to account for necessary training and certification, the PPC encourages the Task Force to recommend the WPS rule be revised to delay the effective date until 2018 at the earliest.

C. National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit (PGP)

The PPC urges the Task Force to recommend modifications of the NPDES PGP requirements to decrease reporting and recordkeeping burdens. The PGP was first issued in 2011 in response to a 6th Circuit Court of Appeals decision. In that litigation, EPA was aligned with the regulated community in opposing the imposition of Clean Water Act (CWA) permitting requirements for pesticide applications into, over and near Waters of the United States. Pesticides and pesticide applications are regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). All pesticides undergo a rigorous review process before being approved by EPA for use. Such testing requirements include extensive studies examining potential human health and environmental effects. FIFRA requires that pesticides used according to label instructions will not generally cause unreasonable adverse effects on the environment. Under FIFRA, applicators also are required to keep detailed records documenting the time, location, type of pesticide, target pests, amount of pesticide applied and pesticide application method. Applicators also must report any knowledge of adverse incidents associated with the use of such pesticides. Failure to comply with FIFRA requirements can result in civil and criminal penalties.

The dual regulation of pesticide application under FIFRA and CWA is duplicative, burdensome, and does not result in enhanced environmental benefit or protection. The potential legal jeopardy from CWA citizen suits for alleged PGP violations has had a chilling effect on the industry. An operator could spend substantial resources defending against a CWA citizen suit for alleged failure to meet reporting and recordkeeping requirements—mere paperwork violations that do not result in environmental harm. The PGP includes a provision that holds all operators jointly and severally liable for violations that occur in connection with permitted activities, including any action or inaction of others that is beyond their control. The threat of legal jeopardy has led some applicators to decline contracts for mosquito-control services. The Benton County Mosquito Control District in Washington State has set aside twenty percent of its annual budget in the event that it becomes party to a CWA lawsuit. These resources could be better spent combatting mosquito-borne illnesses, including the Zika virus.

The PPC recommends scaling back the permitting requirements to eliminate Notice of Intent and annual reporting and recordkeeping requirements, as well as the

permit's joint and several liability provision. An operator should only be held liable for those permitted activities that are completely within his/her control.

II. Process and Policy Reform

The Task Force should consider long overdue reforms of EPA's process and policies that form the foundation for regulatory decision-making. While not regulations per se, under FIFRA, pesticides undergo rigorous study, and registrants spend an estimated \$250 to 280 million to evaluate risk to human health and the environment prior to pesticide registration with label uses approved by EPA. Pesticide products play a vital role in crop production and public health. The rotation and mixture of a variety of pesticide products is integral to integrated pest management. The availability of a wide array of pesticide products is critical to the sustainable and safe use of pesticides and resistance management.

In recent years, EPA's risk assessment approach as part of a FIFRA pesticide registration and registration review has deviated dramatically from the fair, transparent, and risk-balancing process that Congress intended. EPA has relied on flawed science, including data that lacks reliability and reproducibility, in proposed tolerance revocations for a number of pesticide active ingredients. EPA has previously proposed revoking all tolerances for chlorpyrifos based largely on epidemiological studies that EPA's FIFRA Scientific Advisory Panels (SAP) questioned. EPA has failed to address the significant concerns expressed by three FIFRA SAP on these risk assessments, including lack of study validation and unavailability of raw data from studies used in regulatory decision making. Other respected regulatory agencies around the world have reviewed these epidemiological studies and rejected their use in risk assessments that way that EPA has proposed. These data quality issues also run afoul of reproducibility and transparency standards required by the Information Quality Act. EPA's drinking water assessment for chlorpyrifos and many other compounds need further refinement to avoid overly conservative and unrealistic exposure scenarios. Similarly, EPA's preliminary ecological risk assessment for pyrethroids—an entire class of pesticides—relies on modeling approaches to develop a risk assessment for ecological exposure to the pesticides that is not reflective of actual exposure. The models grossly overestimate exposure and will result in the loss of critical tools for farmers.

In December 2016, EPA's Office of Pesticide Programs (OPP) released its "Framework for Incorporating Human Epidemiologic & Incident Data in Risk Assessments for Pesticides" (Framework). This Framework has not been the subject of public notice and comment and requires stakeholder review. As such, the Administration should review and revise the framework with input from relevant

stakeholders, and subject to peer review, before it is used to inform any regulatory decision-making.

The PPC encourages a return to a risk-based approach that is fair, transparent, and relies on verifiable scientific input. The PPC recommends delaying the finalization of these recent actions until further review and refinements ensure that overly conservative and unsupported limitations are not placed on these pesticide products.

CONCLUSION

The PPC appreciates the opportunity to provide input on regulations for the Task Force's recommended regulatory reform actions. The success of many federal regulations hinges on partnerships with state and local authorities, and EPA should ensure those vital authorities have adequate time and assistance with implementation of new rules and standards. As highlighted above, many regulations do not result in increased net environmental benefits, and in some cases may even divert resources from environmental and public health protection efforts. Finally, any regulatory review should examine the processes and policies that have informed regulatory decisions, and ensure that actions are based on sound and credible science. We look forward to working to further assist the Task Force and Administration with identifying ways to decrease ineffective regulatory burdens on agricultural interests that hinder economic growth and innovation.

Sincerely,



Ethan Mathews
Chair, Pesticide Policy Coalition



Beau Greenwood
Vice Chair, Pesticide Policy Coalition

Message

From: Beau Greenwood [BGreenwood@croplifeamerica.org]
Sent: 6/30/2017 7:29:28 PM
To: Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, E]
Subject: Re: Comments - Existing regulations - May 15

Hi Tate. Always best to get me on my cell phone, **Ex. 6**

I am available to talk at your convenience. I will look for your call.

Beau.

Beau Greenwood
Executive Vice President
CropLife America
Washington, DC

On Jun 30, 2017, at 2:20 PM, Bennett, Tate <Bennett.Tate@epa.gov> wrote:

Can I give you a quick buzz

From: Beau Greenwood [mailto:BGreenwood@croplifeamerica.org]
Sent: Friday, June 9, 2017 6:14 PM
To: Bennett, Tate <Bennett.Tate@epa.gov>
Subject: Fwd: Comments - Existing regulations - May 15

Hi Tate. Attached are industry and grower comment letters submitted on May 15 that speak to worker protection and certification and training rules. This would be a good place for us to begin a conversation on this and other related matters.

Hope to see you next week.

Beau.

Beau Greenwood
Executive Vice President
CropLife America
Washington, DC

Begin forwarded message:

From: "Fred Bosco" <FBosco@croplifeamerica.org>
To: "Beau Greenwood" <BGreenwood@croplifeamerica.org>
Subject: Comments - Existing regulations - May 15

Thank you,
Fred

Fred Bosco
Government Relations Coordinator
CropLife America
1156 15th Street NW, Suite 400
Washington, D.C. 20005
P: [Ex. 6] F: 202-355-1411
E: FBosco@croplifeamerica.org
W: www.croplifeamerica.org

From: Washington Ag Communicators [fpurcell@croplifeamerica.org]
Sent: 6/8/2017 2:32:34 PM
To: Bennett, Tate [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1fa92542f7ca4d01973b18b2f11b9141-Bennett, E]
Subject: RSVP today! Washington Ag Communicators Networking Reception

[View in browser](#)



YOU'RE INVITED TO A

PROFESSIONAL MEET & GREET

HOSTED BY THE
WASHINGTON AG COMMUNICATORS

DATE: JUNE 14
TIME: 5:30PM - 7:30PM
VENUE: CAPITOL VISITOR CENTER
ROOM SVC 209-08

LIGHT BITES AND BEVERAGES PROVIDED
MUST RSVP TO ATTEND

All communications staffers are invited to join D.C. agriculture communicators for an evening of networking, food and drink! Leave the

policy at the office and come to find out where to find resources when constituents reach out to you with agriculture related questions. Event is invite only.

Please respond by clicking Yes or No. We look forward to your response!

Your hosts:

CropLife America
National Milk Producers Federation
The Fertilizer Institute
National Corn Growers Association
Farm Credit Council
International Dairy Foods Association
American Frozen Food Institute
White House Writers Group
BIO
Ducks Unlimited
United Egg Producers
American Seed Trade Association
Food Marketing Institute
American Farm Bureau Federation
Agriculture Retailers Association
Crop Insurance and Reinsurance Bureau (CIRB)
National Association of Wheat Growers
USA Rice
American Soybean Association
Farm Journal Foundation
Look East Communications
National Cotton Council

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cvent

Message

From: Bennett, Tate [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1FA92542F7CA4D01973B18B2F11B9141-BENNETT, EL]
Sent: 11/23/2017 1:04:37 AM
To: Jay Vroom [JVroom@croplifeamerica.org]
Subject: RE: CERCLA-EPCRA Update

You too, Jay! Happy Thanksgiving to you and your family. See you soon. -Tate

From: Jay Vroom [mailto:JVroom@croplifeamerica.org]
Sent: Wednesday, November 22, 2017 8:02 PM
To: Bennett, Tate <Bennett.Tate@epa.gov>
Subject: Re: CERCLA-EPCRA Update

Thanks Tate--

Appreciate your staying on task right up to the holiday. Happy Thanksgiving.

Jay

Jay Vroom, CropLife America

Sent from my iPad

On Nov 22, 2017, at 5:56 PM, Bennett, Tate <Bennett.Tate@epa.gov> wrote:

All-

As you may have seen, earlier today, the DC Circuit Court of Appeals granted EPA's motion to **further stay the mandate** of its decision vacating EPA's 2008 rule exempting farms from CERCLA and EPCRA emissions reporting requirements **until January 22, 2018**. More information can be found on EPA's website [here](#).

Happy Thanksgiving Eve.
Tate

Elizabeth Tate Bennett
Associate Administrator for Public Engagement & Environmental Education
Office of the Administrator
U.S. Environmental Protection Agency
(202) 564-1460
Bennett.Tate@epa.gov

Message

From: Bennett, Tate [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1FA92542F7CA4D01973B18B2F11B9141-BENNETT, EL]
Sent: 9/29/2017 7:21:45 PM
To: Ethan Mathews [emathews@croplifeamerica.org]
Subject: Re: Hearing info

Let me get back to you on this

> On Sep 29, 2017, at 3:20 PM, Ethan Mathews <emathews@croplifeamerica.org> wrote:
>
> Tate -
>
> Attached is info CLA is providing to members of the EPW committee in advance of the nominee hearing. We
are particularly focused on the PRIA question. Let me know if you want to discuss.
>
> <9.28.17 Questions - Michael Dourson Nomination Hearing.docx>
>
>
> Ethan Mathews
>
> Director of Government Affairs
> CropLife America
> emathews@croplifeamerica.org
> **Ex. 6** (o)
> (m)
>

Message

From: Bennett, Tate [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1FA92542F7CA4D01973B18B2F11B9141-BENNETT, EL]
Sent: 6/12/2017 8:18:32 PM
To: Fred Bosco [FBosco@croplifeamerica.org]
CC: Beau Greenwood [BGreenwood@croplifeamerica.org]
Subject: Re: Comments - Existing regulations - May 15

Hey! I meant for tomorrow at 5:15 but dovetailing onto weds is good!

On Jun 12, 2017, at 3:56 PM, Fred Bosco <FBosco@croplifeamerica.org> wrote:

Tate,
Unfortunately, Beau is tied up in meetings this afternoon and won't be out until well after 5:15p. He wanted to let you know that he will join the already-scheduled CLA-EPA meeting on Wednesday at 2pm with Nancy and hopes that you will join as well.

Thank you,
Fred

Fred Bosco
Government Relations Coordinator
CropLife America
1156 15th Street NW, Suite 400
Washington, D.C. 20005
P: Ex. 6 | **F:** 202-355-1411
E: FBosco@croplifeamerica.org
W: www.croplifeamerica.org

From: Bennett, Tate [<mailto:Bennett.Tate@epa.gov>]
Sent: Monday, June 12, 2017 12:56 PM
To: Beau Greenwood <BGreenwood@croplifeamerica.org>
Subject: RE: Comments - Existing regulations - May 15

Beau-

I know this sounds way too late in the day to be discussing this, but is 5:15 tomorrow evening at EPA a good time to meet with Nancy and I on this? We can keep it short!

Tate

From: Beau Greenwood [<mailto:BGreenwood@croplifeamerica.org>]
Sent: Friday, June 9, 2017 6:14 PM
To: Bennett, Tate <Bennett.Tate@epa.gov>
Subject: Fwd: Comments - Existing regulations - May 15

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Hope to see you next week.

Beau.

Beau Greenwood
Executive Vice President
CropLife America
Washington, DC

Begin forwarded message:

From: "Fred Bosco" <FBosco@croplifeamerica.org>
To: "Beau Greenwood" <BGreenwood@croplifeamerica.org>
Subject: Comments - Existing regulations - May 15

Thank you,
Fred

Fred Bosco
Government Relations Coordinator
CropLife America
1156 15th Street NW, Suite 400
Washington, D.C. 20005
P: **Ex. 6** F: 202-355-1411
E: FBosco@croplifeamerica.org
W: www.croplifeamerica.org

Message

From: Bennett, Tate [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1FA92542F7CA4D01973B18B2F11B9141-BENNETT, EL]
Sent: 6/20/2017 1:25:14 PM
To: fpurcell@croplifeamerica.org
Subject: Quick call

Hi there!

Can you give me a quick shout?

Ex. 6

Elizabeth Tate Bennett
Senior Deputy Associate Administrator
Congressional and Intergovernmental Affairs
Office of the Administrator
U.S. Environmental Protection Agency

Message

From: Bennett, Tate [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1FA92542F7CA4D01973B18B2F11B9141-BENNETT, EL]
Sent: 6/12/2017 4:56:23 PM
To: Beau Greenwood [BGreenwood@croplifeamerica.org]
Subject: RE: Comments - Existing regulations - May 15

Beau-

I know this sounds way too late in the day to be discussing this, but is 5:15 tomorrow evening at EPA a good time to meet with Nancy and I on this? We can keep it short!

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Beau Greenwood
Executive Vice President
CropLife America
Washington, DC

Begin forwarded message:

From: "Fred Bosco" <FBosco@croplifeamerica.org>
To: "Beau Greenwood" <BGreenwood@croplifeamerica.org>
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Fred

Fred Bosco
Government Relations Coordinator
CropLife America
1156 15th Street NW, Suite 400

Washington, D.C. 20005

P: Ex. 6 | F: 202-355-1411

E: FBosco@croplifeamerica.org

W: www.croplifeamerica.org

Message

From: Bennett, Tate [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1FA92542F7CA4D01973B18B2F11B9141-BENNETT, EL]
Sent: 6/10/2017 1:28:08 AM
To: Beau Greenwood [BGreenwood@croplifeamerica.org]
Subject: Re: Comments - Existing regulations - May 15

So interestingly enough, Nancy already has a meeting on the books w crop life next week. Are you in that one? Maybe on another topic?

> On Jun 9, 2017, at 6:14 PM, Beau Greenwood <BGreenwood@croplifeamerica.org> wrote:

>

> Hi Tate. Attached are industry and grower comment letters submitted on May 15 that speak to worker protection and certification and training rules. This would be a good place for us to begin a conversation on this and other related matters.

>

> Hope to see you next week.

>

> Beau.

>

>

>

> Beau Greenwood
> Executive Vice President
> CropLife America
> Washington, DC

>

> Begin forwarded message:

>

> From: "Fred Bosco" <FBosco@croplifeamerica.org<mailto:FBosco@croplifeamerica.org>>

> To: "Beau Greenwood" <BGreenwood@croplifeamerica.org<mailto:BGreenwood@croplifeamerica.org>>

> Subject: Comments - Existing regulations - May 15

>

>

>

> Thank you,

> Fred

>

> Fred Bosco
> Government Relations Coordinator
> CropLife America
> 1156 15th Street NW, Suite 400
> Washington, D.C. 20005

> P: Ex. 6 I F: 202-355-1411

> E: FBosco@croplifeamerica.org<mailto:FBosco@croplifeamerica.org>

> W: www.croplifeamerica.org<http://www.croplifeamerica.org/>

>

> <CropLife America Comments on Evaluation of Existing Regulations signed.pdf>

> <EPA-HQ-OA-2017-0190 PPC Comments re Regulatory Reform.pdf>

> <EPA-Final17.0515 AFBF et al.pdf>

Message

From: Bennett, Tate [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1FA92542F7CA4D01973B18B2F11B9141-BENNETT, EL]
Sent: 6/30/2017 6:18:46 PM
To: Beau Greenwood [BGreenwood@croplifeamerica.org]
Subject: RE: Comments - Existing regulations - May 15

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From: Beau Greenwood [mailto:BGreenwood@croplifeamerica.org]
Sent: Friday, June 9, 2017 6:14 PM
To: Bennett, Tate <Bennett.Tate@epa.gov>
Subject: Fwd: Comments - Existing regulations - May 15

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Beau.

Beau Greenwood
Executive Vice President
CropLife America
Washington, DC

Begin forwarded message:

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To: "Beau Greenwood" <BGreenwood@croplifeamerica.org>
Subject: Comments - Existing regulations - May 15

Thank you,
Fred

Fred Bosco
Government Relations Coordinator
CropLife America
1156 15th Street NW, Suite 400
Washington, D.C. 20005
P: Ex. 6 **F:** 202-355-1411
E: FBosco@croplifeamerica.org
W: www.croplifeamerica.org

Message

From: Bennett, Tate [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1FA92542F7CA4D01973B18B2F11B9141-BENNETT, EL]
Sent: 4/12/2018 4:33:22 PM
To: Ethan Mathews [emathews@croplifeamerica.org]
CC: Jackson, Ryan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=38bc8e18791a47d88a279db2fec8bd60-Jackson, Ry]; Bowman, Liz [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c3d4d94d3e4b4b1f80904056703ebc80-Bowman, Eli]; Lyons, Troy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=15e4881c95044ab49c6c35a0f5eef67e-Lyons, Troy]
Subject: Re: CropLife America Support Letter for Andrew Wheeler

Thank you!

On Apr 12, 2018, at 11:49 AM, Ethan Mathews <emathews@croplifeamerica.org> wrote:

Tate -

Below is a letter of support for Andrew Wheeler that was sent to each US Senate office.

Ethan

From: CropLife America <emathews@croplifeamerica.org>
Sent: Wednesday, April 11, 2018 8:00 PM
To: Ethan Mathews <emathews@croplifeamerica.org>
Subject: CropLife America Support Letter for Andrew Wheeler

April 11, 2018

The Honorable Dan Sullivan

United State Senate

702 Hart Senate Office Building

Washington, DC 20510

Dear Senator Sullivan:

CropLife America is pleased to support the nomination of Andrew Wheeler to serve as the Deputy Administrator of the United States Environmental Protection Agency (EPA). CLA is the national trade association that represents the manufacturers, formulators and distributors of pesticides in the United States. CLA's member companies produce, sell and distribute virtually all the vital and necessary crop protection and biotechnology products used by American farmers, ranchers and landowners.

The mission of the EPA is to protect human health and the environment. However, more than a year into the new Administration, the EPA lacks Senate-confirmed Deputy and Assistant Administrators to carry out this mission. The EPA plays an important role in CLA members' ability to bring innovation to the market place. Ensuring that the Agency is appropriately staffed will allow the EPA to carry out its work on behalf of all stakeholders.

Mr. Wheeler's substantial public service experience makes him an excellent choice for leadership at the EPA. He began his career at the EPA, where he worked on toxic chemical, pollution prevention and right-to-know issues, and he was awarded the EPA Bronze Medal twice for his accomplishments. Mr. Wheeler also served as the Senate Environment and Public Works Committee majority staff director, minority staff director, and chief counsel. In these roles, he worked on every major piece of environmental and energy-related legislation before Congress for over a decade.

To ensure that EPA is able to carry out its important work in an effective and efficient manner, we urge you to vote in support of Mr. Wheeler's nomination to serve as Deputy Administrator.

Sincerely,

Jay Vroom

CEO, CropLife America

Cc:

The Honorable Mitch McConnell
Majority Leader
United State Senate
Washington, DC 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
Washington, DC 20510

From: Bennett, Tate [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1FA92542F7CA4D01973B18B2F11B9141-BENNETT, EL]
Sent: 5/14/2018 10:12:08 PM
To: emathews@croplifeamerica.org
Subject: Fwd: Administrator Pruitt Announces New Office of Continuous Improvement

Begin forwarded message:

From: "EPA Press Office" <press@epa.gov>
Date: May 14, 2018 at 4:31:05 PM EDT
To: "Bennett.Tate@epa.gov" <Bennett.Tate@epa.gov>
Subject: Administrator Pruitt Announces New Office of Continuous Improvement
Reply-To: press@epa.gov

Administrator Pruitt Announces New Office of Continuous Improvement

Provides update on EPA Lean Management System

WASHINGTON (May 14, 2018) - Today, U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt met with more than 75 employees and stakeholders to provide an update on the implementation of the new EPA Lean Management System (ELMS) and announced EPA's new Office of Continuous Improvement (OCI) and its director, Serena McIlwain.

"Through Lean Management, EPA is tracking, measuring, and improving vital agency processes, such as permitting and meeting legal deadlines on time, for the first time," **said EPA Administrator Scott Pruitt.** "Establishing the Office of Continuous Improvement will ensure that these actions are implemented throughout the Agency and produce lasting results for years to come."

EPA established OCI to coordinate agency-wide implementation of ELMS. ELMS is a system that will enable the Agency to track important Agency actions to ensure we respond and resolve challenges quickly and thoroughly using Lean principles and tools. Prior to this administration, EPA was not systematically or regularly tracking key actions such as permitting, meeting legal deadlines, and correcting environmental violations. With ELMS, all parts of EPA will set ambitious and achievable targets for their work, measure their results, and improve their processes to bridge gaps between targets and

results. ELMS uses visual management with regularly updated performance and work flow data to monitor progress toward EPA's Strategic Plan targets. EPA's programs and regional offices hold monthly reviews of the performance data and report their progress to the agency's Chief of Operations. Administrator Pruitt will hold quarterly reviews to monitor overall progress on the Agency's Strategic Plan and priority areas.

"EPA has a long history of using Lean as a tool for process improvement. The new EPA Lean Management System and the Office of Continuous Improvement will take the Agency's efforts to the next level by creating the means to efficiently identify and resolve any process challenges and continue achieving our important mission of protecting human health and the environment," **said EPA Chief Operating Officer Henry Darwin.**

Through reorganization, EPA is using existing resources to support the Office of Continuous Improvement. The near-term goal of OCI is to deploy ELMS in 80 percent of agency work units by September 30, 2020. The creation of OCI builds on the process improvement work in which EPA has been engaged for a decade. ELMS will improve EPA's efficiency and effectiveness, increase employee engagement, and promote much greater accountability at the Agency.

"I am very grateful to have been selected as the first director of EPA's new Office of Continuous Improvement. My team is eager to provide the Agency with the training, tools, and support needed to bring ELMS to life. I look forward to supporting EPA's transformation to a much more efficient and effective organization," **said EPA Director of the Office of Continuous Improvement Serena McIlwain.**

Some ELMS accomplishments to date include:

- ✧ Established over 400 metrics across all EPA program and regional offices that are tracked monthly,
- ✧ Created a standardized method for communicating whether monthly targets are being met using a red/yellow/green system
- ✧ Implemented measures specifically designed to improve the time EPA takes to complete many of its core functions, including issuing permits, meeting the agency's legal deadlines, correcting environmental violations, completing reviews of new active ingredients, and others.
- ✧ Integrated monthly business reviews for all EPA program and regional offices at which the agency's senior leaders review their office's performance.
- ✧ Hosted 11 multi-day process improvement events to support rapid progress in the following areas: NPDES Section 402 permits, Underground Injection Control permits, TSCA Premanufacture Notice Final Determinations, Acquisition Quality, Simplified

Acquisitions, Clean Air Act State Implementation Plans, Freedom of Information Act requests, Brownfields, Superfund, Clean Air Act Title V, and Clean Air Act New Source Review for Preconstruction.

- Initiated training for EPA staff and first line supervisors on how to use ELMS at the work unit level. This includes developing a small cadre of ELMS “I am very grateful to have been selected as the first director of EPA’s new Office of Continuous Improvement.

Background on Serena McIlwain:

Serena McIlwain has served in the federal government for nearly 30 years, working in both the legislative and executive branches of government. Most recently, Serena was selected as EPA’s Performance Improvement Officer (PIO) and Director of the newly created Office of Continuous Improvement. In this role, Serena will implement the new EPA Lean Management System (ELMS) to drive accountability and performance improvement. Prior to assuming her new role, Serena was the Assistant Regional Administrator and Director of the Environmental Management Division at EPA Region 9 in San Francisco, CA. Before joining EPA in 2014, she served as the Chief Operating Officer at the Department of Energy’s Fossil Energy department, providing management and operational support for scientists, engineers, technicians and administrative professionals.

Video of today’s announcement can be viewed here: <https://www.epa.gov/home/live>

EPA Administrator Scott Pruitt announces the new Office of Continuous Improvement

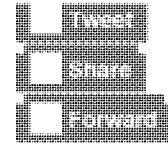
EPA Chief Operating Officer Henry Darwin discusses the new EPA Lean Management System and his vision for the Office of Continuous Improvement.

New EPA Director of the Office of Continuous Improvement Serena McIlwain explains her new position within the Agency

<!--[if ms0]-->**Visit The EPA's Newsroom**<!--[endif]-->



U.S. Environmental Protection Agency
1200 Pennsylvania Avenue Northwest
Washington, D.C. 20004



[Unsubscribe](#)

Message

From: Bolen, Brittany [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=31E872A691114372B5A6A88482A66E48-BOLEN, BRIT]
Sent: 3/8/2018 1:08:34 AM
To: Beau Greenwood [BGreenwood@croplifeamerica.org]
CC: James McVaney [james.mcvaney@bayer.com]; Fred Bosco [FBosco@croplifeamerica.org]
Subject: RE: Meet w/Bayer

Hello -

It is unclear why the email chain below depicts me as the sender as I sent no such email today. I had no knowledge of the email and it is not in my sent box. I presently have several staff who have ownership access to my calendar and email, and will follow up with them to take necessary steps to avoid this sort of issue moving forward.

Thank you,
Brittany

-----Original Message-----

From: Beau Greenwood [mailto:BGreenwood@croplifeamerica.org]
Sent: Wednesday, March 7, 2018 6:51 PM
To: Bolen, Brittany <bolen.brittany@epa.gov>
Cc: James McVaney <james.mcvaney@bayer.com>; Fred Bosco <FBosco@croplifeamerica.org>
Subject: Re: Meet w/Bayer

Ha! I look forward to our visit next week.

Beau.

> On Mar 7, 2018, at 9:40 AM, Bolen, Brittany <bolen.brittany@epa.gov> wrote:

>
> Beau, looks like the heavies are coming.

>
>
> Sent from my iPhone

> Begin forwarded message:

>
> From: "Bolen, Brittany" <bolen.brittany@epa.gov<mailto:bolen.brittany@epa.gov>>
> To: "Dravis, Samantha" <dravis.samantha@epa.gov<mailto:dravis.samantha@epa.gov>>, "Beck, Nancy" <Beck.Nancy@epa.gov<mailto:Beck.Nancy@epa.gov>>, "Inge, Carolyn" <Inge.Carolyn@epa.gov<mailto:Inge.Carolyn@epa.gov>>, "Luke Tomanelli" <luke.tomanelli@bayer.com<mailto:luke.tomanelli@bayer.com>>
> Subject: Meet w/Bayer

>
>
> Directions: Please use the William Jefferson Clinton North Entrance located on your right as you exit the Federal Triangle Metro Station. Please arrive 10 minutes prior to the meeting with photo IDs to clear security.

> EPA Contact: For an escort from security to the meeting, please call (202) 564-4332; for all other matters, please call Robin Kime (202) 564-6587.

> <meeting.ics>

Message

From: Jay Vroom [JVroom@croplifeamerica.org]
Sent: 4/18/2017 9:38:02 PM
To: Brown, Byron [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9242d85c7df343d287659f840d730e65-Brown, Byro]
CC: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
Subject: Re: Call request

Thanks!

Sent from my iPhone

On Apr 18, 2017, at 5:07 PM, Brown, Byron <brown.byron@epa.gov> wrote:

My scheduler has been out since last week. I will check my schedule and propose times.

Sent from my iPhone

On Apr 18, 2017, at 5:03 PM, Jay Vroom <JVroom@croplifeamerica.org> wrote:

Byron,

I haven't had the best luck connecting with you by phone the last couple of days. It's important that we talk, as we are moving toward a meeting at the White House next week. Could you connect with Mary Jo to schedule a time to talk? She is copied here.

Thanks,
Jay

Jay Vroom
President & CEO
CroLife America
1156 15th Street, NW
Suite 400
Washington, DC 20005
Direct Dial () **Ex. 6**
Main Switchboard (202) 296-1585
Mobile () **Ex. 6**
Fax (202) 466-5832
Email vroom@croplifeamerica.org
Executive Assistant Mary Jo Tomalewski (mjtomalewski@croplifeamerica.org,
202.872.3849 o, () **Ex. 6** m)
Web www.croplifeamerica.org

Message

From: Rebeckah Adcock [RADcock@croplifeamerica.org]
Sent: 3/29/2017 3:23:11 PM
To: Brown, Byron [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9242d85c7df343d287659f840d730e65-Brown, Byro]
Subject: RE: Meeting requests from CLA and the Ag CEO Council

Byron -
(just sent to Sydney, too)

Here is the best information currently available for your use in planning the meeting.

Based on recent discussions, CLA believes this list is accurate for the likely topics the CEO's will mention. If we are made of other issues as the CEO's meet today, I will let you know.

The subject of the meeting is "**EPA's Regulation of Agriculture.**"

Specifically, the CEOs will

- 1) acknowledge the many actions taken already to correct recent regulatory overreach and,
- 2) identify priority recommendations that could further ease the burden to the farmers, and agricultural business and technology providers, including...
 - Water –
 - WOTUS - Considerations re future action on WOTUS rule.
 - NPDES Permits – 1) CAFO program, 2) legislative fix to clarify that water permits are not needed for the lawful application of federally approved pesticides.
 - Pesticides –
 - Improve Pesticide Registration Compliance with Endangered Species Act - Administration leadership on robust and full implementation of interagency cooperation to bring the pesticide registration process into compliance with ESA.
 - Reform Final "Certification & Training" & Worker Protection Rules – Delay and amend the recently released final rules on related to pesticide handling, workers and training. Implementation should be suspended and the rules should be revisited and revised before re-proposal.
 - Renewable Fuels Standard - Support for the current program.

Rebeckah

radcock@croplifeamerica.org

Ex. 6 phone

From: Brown, Byron [mailto:brown.byron@epa.gov]
Sent: Wednesday, March 29, 2017 5:32 AM
To: Rebeckah Adcock <RADcock@croplifeamerica.org>
Subject: Re: Meeting requests from CLA and the Ag CEO Council

Hi Rebeckah - do you have a list of attendees or briefing material you want us to have in advance? Thanks. -
Byron

Sent from my iPhone

On Mar 28, 2017, at 1:37 PM, Rebeckah Adcock <RADcock@croplifeamerica.org> wrote:

Thanks much, gentlemen. The CEO Council is looking forward to meeting with the Administrator this Thursday @ 3:45.

On their behalf, we are all grateful for the opportunity.

Kindly,
Reb

From: Rebeckah Adcock
Sent: Tuesday, March 28, 2017 11:01 AM
To: Rebeckah Adcock <RADcock@croplifeamerica.org>; Ryan Jackson (jackson.ryan@epa.gov) <jackson.ryan@epa.gov>
Cc: brown.byron@epa.gov
Subject: Re: Meeting requests from CLA and the Ag CEO Council

Busy week for EPA, so checking back in re #2 below to let the CEO Council know one way or the other.

Kindly, Reb

Rebeckah Adcock
radcock@croplifeamerica.org

Ex. 6

 phone

From: Rebeckah Adcock
Sent: Friday, March 17, 2017 2:10:28 PM
To: Ryan Jackson (jackson.ryan@epa.gov)
Cc: brown.byron@epa.gov; Rebeckah Adcock
Subject: Meeting requests from CLA and the Ag CEO Council

Ryan,

Byron may be forwarding this request to you, but, I would like to suggest an adjustment to over-asking of your time. Specifically...

1. As requested, would either or both of you be available to brief the CropLife America (CLA) 'Strategic Oversight Council (SOC)' (association operating board = pesticide business leaders) next Tues or Wed, March 21 or 22 at CLA's office, 1156 15th St, NW, Ste 400, Washington, DC?_
2. **Amended request**, would Administrator Pruitt be available to reschedule the meeting with the *Production Ag "CEO Council"* (full membership of the small group Byron met with last week) Wed or Thurs, March 29 or 30? This group can come to EPA or welcome him to the meeting also being held at CLA's office, 1156 15th St, NW, Ste 400, Washington, DC.

Thanks for each of your receptiveness to our outreach to the Agency as you are building your leadership team and priorities. We are flexible in the 'who, when and where' of each of these meeting requests, and look forward to hearing from your office soon.

Kindly,

Rebeckah

radcock@croplifeamerica.org

Ex. 6 phone

From: Jay Vroom
Sent: Thursday, March 16, 2017 3:18 PM
To: brown.byron@epa.gov
Cc: Rebeckah Adcock <RADcock@croplifeamerica.org>
Subject: Thanks for a great conversation on Monday!

Byron,

Great to meet you on Monday along with the group of other ag organization leaders —thanks again for your time and focus!

Rebeckah Adcock on my CLA team (copied here—her phone numbers are 2 **Ex. 6** 1-office; **Ex. 6** mobile) will be reaching out to you and Ryan about a couple strategic events we're planning the next couple of weeks—

1. March 21-22 Meeting of CropLife America Strategic Oversight Council (our operating board)
2. March 29-30 Meeting of the Production Ag "CEO Council"

Both these meetings will be at our office at 1156 15th St, NW, Washington, DC. Hoping that you or Ryan or both of you might be available to spend a little time with both these groups!

Jay

Jay Vroom
President & CEO
CropLife America
1156 15th Street, NW
Suite 400
Washington, DC 20005

Ex. 6 D)

Ex. 6 (M)

Vroom@croplifeamerica.org
www.croplifeamerica.org

Message

From: Rebeckah Adcock [RADcock@croplifeamerica.org]
Sent: 3/29/2017 10:47:22 AM
To: Brown, Byron [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9242d85c7df343d287659f840d730e65-Brown, Byro]
Subject: Re: Meeting requests from CLA and the Ag CEO Council

My bosses assistant is working on the final attendee list and I am getting the issue list together ASAP too.

Since it's the all Ag group not just crop protection, we've has to re survey. Will be similar topics to, though smaller list, what they discussed with you a couple we ago.

Rebeckah Adcock
radcock@croplifeamerica.org
Ex. 6 phone

From: Brown, Byron <brown.byron@epa.gov>
Sent: Wednesday, March 29, 2017 5:32:05 AM
To: Rebeckah Adcock
Subject: Re: Meeting requests from CLA and the Ag CEO Council

Hi Rebeckah - do you have a list of attendees or briefing material you want us to have in advance? Thanks. - Byron

Sent from my iPhone

On Mar 28, 2017, at 1:37 PM, Rebeckah Adcock <RADcock@croplifeamerica.org> wrote:

Thanks much, gentlemen. The CEO Council is looking forward to meeting with the Administrator this Thursday @ 3:45.

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Kindly,
Reb

From: Rebeckah Adcock
Sent: Tuesday, March 28, 2017 11:01 AM
To: Rebeckah Adcock <RADcock@croplifeamerica.org>; Ryan Jackson (jackson.ryan@epa.gov) <jackson.ryan@epa.gov>
Cc: brown.byron@epa.gov
Subject: Re: Meeting requests from CLA and the Ag CEO Council

Busy week for EPA, so checking back in re #2 below to let the CEO Council know one way or the other.

Kindly, Reb

Rebeckah Adcock
radcock@croplifeamerica.org

Ex. 6 phone

From: Rebeckah Adcock
Sent: Friday, March 17, 2017 2:10:28 PM
To: Ryan Jackson (jackson.ryan@epa.gov)
Cc: brown.byron@epa.gov; Rebeckah Adcock
Subject: Meeting requests from CLA and the Ag CEO Council

Ryan,

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1. As requested, would either or both of you be available to brief the CropLife America (CLA) 'Strategic Oversight Council (SOC)' (association operating board = pesticide business leaders) next Tues or Wed, March 21 or 22 at CLA's office, 1156 15th St, NW, Ste 400, Washington, DC?_
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Thanks for each of your receptiveness to our outreach to the Agency as you are building your leadership team and priorities. We are flexible in the 'who, when and where' of each of these meeting requests, and look forward to hearing from your office soon.

Kindly,

Rebeckah

radcock@croplifeamerica.org

Ex. 6 phone

From: Jay Vroom
Sent: Thursday, March 16, 2017 3:18 PM
To: brown.byron@epa.gov
Cc: Rebeckah Adcock <RAdcock@croplifeamerica.org>
Subject: Thanks for a great conversation on Monday!

Byron,

Great to meet you on Monday along with the group of other ag organization leaders —thanks again for your time and focus!

Rebeckah Adcock on my CLA team (copied here—her phone numbers are 202 872-3841-office; 703 501 9371-mobile) will be reaching out to you and Ryan about a couple strategic events we're planning the next couple of weeks—

1. March 21-22 Meeting of CropLife America Strategic Oversight Council (our operating board)
2. March 29-30 Meeting of the Production Ag "CEO Council"

Both these meetings will be at our office at 1156 15th St, NW, Washington, DC. Hoping that you or Ryan or both of you you might be available to spend a little time with both these groups!

Jay

Jay Vroom
President & CEO
CropLife America
1156 15th Street, NW
Suite 400
Washington, DC 20005

Ex. 6 (O)
(M)

Vroom@croplifeamerica.org
www.croplifeamerica.org

Message

From: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
Sent: 4/17/2017 2:16:25 PM
To: Brown, Byron [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9242d85c7df343d287659f840d730e65-Brown, Byro]
Subject: Re: Request for Conference Call with Jay Vroom
Attachments: removed.txt

Great--what's the best number to reach you?

Sent from my iPhone

On Apr 17, 2017, at 10:15 AM, Brown, Byron <brown.byron@epa.gov> wrote:

My scheduler has been out so this did not get scheduled. I have time until 12:30 today.

From: Mary Jo Tomalewski [<mailto:mjtomalewski@croplifeamerica.org>]
Sent: Wednesday, April 12, 2017 4:00 PM
To: Brown, Byron <brown.byron@epa.gov>
Subject: Request for Conference Call with Jay Vroom

Hello, Byron,

Jay asked me to reach out to you to set up a call to talk on Monday, April 17. Do you have some time to talk to catch up, for 15 or 20 minutes? He has a meeting from 2-3p; otherwise, he's wide open.

Thanks,
MJ

Mary Jo Tomalewski
Executive Assistant to the President & CEO
CroLife America
1156 15th Street, NW
Suite 400
Washington, DC 20005
Direct Dial [Ex. 6]
Main Switchboard (202) 296-1585
Mobile [Ex. 6]
Fax (202) 466-5832
Email mjtomalewski@croplifeamerica.org
Web www.croplifeamerica.org

<image001.jpg> *How can I serve you today?*

Future Meetings

2017 Spring Regulator Conference – April 6-7, Arlington, VA
2017 Annual Meeting – September 22-27, Dana Point, CA
2018 Winter Board of Directors Meeting – March 5-7, Washington, DC
2018 Annual Meeting – September 21-26, The Ritz-Carlton Amelia Island

***** ATTACHMENT REMOVED *****

This message contained an attachment which the administrator has caused
to be removed.

***** ATTACHMENT REMOVED *****

Attachment name: [image001.jpg]

Attachment type: [image/jpeg]

Message

From: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
Sent: 4/12/2017 8:00:00 PM
To: Brown, Byron [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9242d85c7df343d287659f840d730e65-Brown, Byro]
Subject: Request for Conference Call with Jay Vroom

Hello, Byron,

Jay asked me to reach out to you to set up a call to talk on Monday, April 17. Do you have some time to talk to catch up, for 15 or 20 minutes? He has a meeting from 2-3p; otherwise, he's wide open.

Thanks,
MJ

Mary Jo Tomalewski

Executive Assistant to the President & CEO

CroLife America

1156 15th Street, NW

Suite 400

Washington, DC 20005

Direct Dial Ex. 6

Main Switchboard (202) 296-1585

Mobile Ex. 6

Fax (202) 466-5832

Email mjtomalewski@croplifeamerica.org

Web www.croplifeamerica.org



How can I serve you today?

Future Meetings

2017 Spring Regulator Conference – April 6-7, Arlington, VA

2017 Annual Meeting – September 22-27, Dana Point, CA

2018 Winter Board of Directors Meeting – March 5-7, Washington, DC

2018 Annual Meeting – September 21-26, The Ritz-Carlton Amelia Island

Message

From: Jay Vroom [JVroom@croplifeamerica.org]
Sent: 5/15/2017 1:59:20 PM
To: Brown, Byron [/o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=9242d85c7df343d287659f840d730e65-Brown, Byro]
Subject: Syngenta visitor?

Hi Byron,

I understand that the Administrator may spend some time later today visiting with Syngenta's global CEO Erik Fyrwald? As you may recall, Syngenta is one of our most active and largest member companies and is well aligned with our approach to the major industry issues. Erik is an accomplished veteran of our industry and I am confident he and the Administrator will hit it off very well. Let me know if there is anything I can assist with as you prep for that meeting.

Jay

Jay Vroom
President & CEO
CropLife America
1156 15th Street, NW
Suite 400
Washington, DC 20005
202 872 3850 (O)
Ex. 6 2 (M)
Vroom@croplifeamerica.org
www.croplifeamerica.org

Message

From: Dravis, Samantha [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ECE53F0610054E669D9DFFE0B3A842DF-DRAVIS, SAM]
Sent: 5/22/2017 12:07:57 PM
To: Jay Vroom [JVroom@croplifeamerica.org]; Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]
Subject: RE: Agri-Pulse Instant Update: Open Mic with Jay Vroom, CEO of CropLife America

Thank you, Jay! We still need to get a call set up.

From: Jay Vroom [mailto:JVroom@croplifeamerica.org]
Sent: Sunday, May 21, 2017 5:16 PM
To: Dravis, Samantha <dravis.samantha@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: Fwd: Agri-Pulse Instant Update: Open Mic with Jay Vroom, CEO of CropLife America

Hello Samantha and Sarah

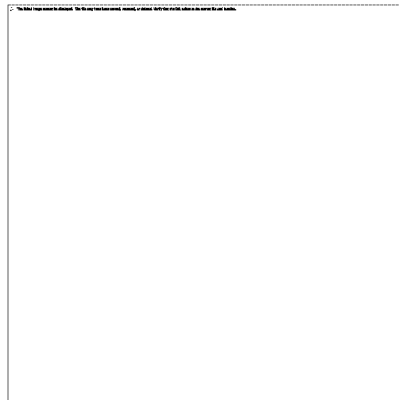
The attached interview gave us the chance to tell listeners about the great work you all are doing at EPA for farmers. Thank you.

Jay

Sent from my iPhone

Begin forwarded message:

From: Sara Wyant <sara@agri-pulse.com>
Date: May 21, 2017 at 1:58:28 PM EDT
To: <jvroom@croplifeamerica.org>
Subject: Agri-Pulse Instant Update: Open Mic with Jay Vroom, CEO of CropLife America
Reply-To: Sara Wyant <sara@agri-pulse.com>



Jay Vroom, CEO of CropLife America (Open Mic)

This week's guest on Open Mic is Jay Vroom, President and CEO of CropLife America.



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Our mailing address is:

110 Waterside Lane, Camdenton, MO 65020

Want to change how you receive these emails?

You can [update your preferences](#) or [unsubscribe from this list](#)

Message

From: Kellie Bray [KBray@croplifeamerica.org]
Sent: 5/8/2017 9:36:52 PM
To: Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]
Subject: Looking for contact information

Hello Sarah,

It was a pleasure speaking with you on the phone last week and I look forward to working with you. I have been given Don Robinson's name as someone to reach out to on a particular issue but unfortunately I do not have his contact information. Do you know Don and have contact information for him by any chance?

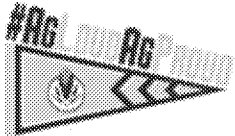
Thank you very much for any insight you can provide!

Kellie

Kellie Bray
Senior Director, Government Affairs
CropLife America
1156 15th St., NW
Suite 400
Washington, DC 20005
202-872-3899 (office)

Ex. 6 (cell phone)

Ask me how you can show your love of all things agriculture with our #AgLoudAgProud campaign!



Message

From: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
Sent: 4/25/2017 1:51:35 PM
To: Washington, Valerie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d031c02ce3a416dad0d421ee998d5a3-VWASHING]
CC: Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]
Subject: Jay Vroom et al

Valerie,

Jay Vroom will be accompanied by 3 of his colleagues today – Beau Greenwood, EVP for Government Affairs, Janet Collins, EVP for Science & Regulatory Affairs, and Rachel Lattimore, our general counsel.

They will see you soon!

MJ

Mary Jo Tomalewski

Executive Assistant to the President & CEO
CropLife America
1156 15th Street, NW
Suite 400
Washington, DC 20005
Direct Dial (202) 872-3849
Main Switchboard (202) 296-1585
Mobile Ex. 6
Fax (202) 466-5832
Email mjtomalewski@croplifeamerica.org
Web www.croplifeamerica.org



How can I serve you today?

Future Meetings

2017 Spring Regulator Conference – April 6-7, Arlington, VA
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Message

From: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
Sent: 4/20/2017 1:29:14 PM
To: Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]
Subject: RE: Introduction

Hi, Sarah!

I will send a calendar appointment, for Tuesday, April 25 at 10:30a. Jay will call you on your office line, which I see in your email signature below?

MJ

Mary Jo Tomalewski

Executive Assistant to the President & CEO

CropLife America

Direct Dial (202) 872-3849

Mobility **Ex. 6**

Email mjtomalewski@croplifeamerica.org



How can I serve you today?

Future Meetings

2017 Spring Regulator Conference – April 6-7, Arlington, VA

2017 Annual Meeting – September 22-27, Dana Point, CA

2018 Winter Board of Directors Meeting – March 5-7, Washington, DC

2018 Annual Meeting – September 21-26, The Ritz-Carlton Amelia Island

From: Greenwalt, Sarah [mailto:greenwalt.sarah@epa.gov]
Sent: Wednesday, April 19, 2017 6:30 PM
To: Jay Vroom <JVroom@croplifeamerica.org>
Cc: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Subject: RE: Introduction

Sounds good!

Sarah A. Greenwalt

Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722 | Cell: **Ex. 6**

Greenwalt.Sarah@epa.gov

From: Jay Vroom [mailto:JVroom@croplifeamerica.org]
Sent: Wednesday, April 19, 2017 6:20 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Cc: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Subject: RE: Introduction

OK—let us confirm in the morning as Mary Jo is really in charge of my calendar and I need to double check with her tomorrow first thing. THANKS!

Jay Vroom

President & CEO

CropLife America

Direct Dial: 202.872.3850

Mobile: Ex. 6

Executive Assistant: Mary Jo Tomalewski (202.872.3849, mjtomalewski@croplifeamerica.org)

From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]

Sent: Wednesday, April 19, 2017 6:11 PM

To: Jay Vroom <JVroom@croplifeamerica.org>

Subject: Re: Introduction

Sure, I'm free next Tuesday from 10:30-11:30

Sent from my iPhone

On Apr 19, 2017, at 6:06 PM, Jay Vroom <JVroom@croplifeamerica.org> wrote:

Thanks Sarah and Byron!

Unfortunately I'm heading off on a business trip Friday morning early and don't return until Monday night. How about sometime next Tuesday April 25?

Jay

Jay Vroom

President & CEO

CropLife America

Direct Dial: 202.872.3850

Mobile: Ex. 6

Executive Assistant: Mary Jo Tomalewski (202.872.3849, mjtomalewski@croplifeamerica.org)

From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]

Sent: Wednesday, April 19, 2017 5:28 PM

To: Brown, Byron <brown.byron@epa.gov>

Cc: Jay Vroom <JVroom@croplifeamerica.org>

Subject: RE: Introduction

Appreciate the introduction, Byron!

Jay, it's nice to meet you electronically. I would love to set up a call to get your take on an ESA issue I've been working on. Do you have any availability for this Friday afternoon?

Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722 | Cell: Ex. 6

Greenwalt.Sarah@epa.gov

From: Brown, Byron
Sent: Wednesday, April 19, 2017 12:14 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Cc: vroom@croplifeamerica.org
Subject: Introduction

Hi Sarah – I wanted to introduce you to Jay Vroom of CropLife America. He would be a good resource for ESA issues. - Byron

Jay Vroom
President & CEO
CropLife America
1156 15th Street, NW
Suite 400
Washington, DC 20005
Direct Dial (202) 872-3850
Main Switchboard (202) 296-1585
Mobile Ex. 6
Fax (202) 466-5832
Email vroom@croplifeamerica.org
Executive Assistant Mary Jo Tomalewski (mjtomalewski@croplifeamerica.org, 202.872.3849 o,
703.943.9705 m)
Web www.croplifeamerica.org

Byron R. Brown
Deputy Chief of Staff for Policy
Office of the Administrator
U.S. Environmental Protection Agency

Message

From: Dravis, Samantha [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ECE53F0610054E669D9DFFE0B3A842DF-DRAVIS, SAM]
Sent: 5/15/2017 6:19:31 PM
To: Beau Greenwood [BGreenwood@croplifeamerica.org]
CC: Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]
Subject: RE: CropLife America follow-up, EPA testimony before Senate Ag

Very glad to hear that. Thanks, Beau. I am sorry we did not connect by phone, but let me know if you would like to catch up in coming weeks.

From: Beau Greenwood [mailto:BGreenwood@croplifeamerica.org]
Sent: Monday, May 15, 2017 2:12 PM
To: Dravis, Samantha <dravis.samantha@epa.gov>
Cc: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: CropLife America follow-up, EPA testimony before Senate Ag

Hi Samantha. I wanted to follow-up with you and let you know that Rick Keigwin (EPA-OPP) did a fine job last week when he testified before the Senate Agriculture Committee despite the tricky assignment.

Regards, Beau.

*Beau Greenwood
Executive Vice President
CropLife America
Washington, DC*

Ex. 6

Message

From: Rachel Lattimore [RLattimore@croplifeamerica.org]
Sent: 5/2/2017 2:06:06 PM
To: Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]
CC: Jay Vroom [JVroom@croplifeamerica.org]; janet collins [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=usera98e8fe5]; Beau Greenwood [BGreenwood@croplifeamerica.org]
Subject: RE: Thanks for our ESA discussion this morning
Attachments: CBD 2-2-17.pdf; Washington Toxics Coalition v US Dept of Interior Fish and Wildlife Serv....pdf

Sarah,

I'd like to add my thanks to Jay's, and to pass along the recent 9th Circuit decision we mentioned in our meeting, along with an earlier case on this topic you may find of interest. Beau will be following up with you later today on outcomes from our other meetings. Please don't hesitate to get in touch if you have any questions regarding these decisions or if you'd like to discuss them further.

Best regards,

Rachel

Rachel G. Lattimore
Senior Vice President, General Counsel, Secretary
CropLife America
1156 15th Street, NW
Suite 400
Washington, DC 20005
(202) 872-3895 - direct
(202) 296-1585 - main
rlattimore@croplifeamerica.org
www.croplifeamerica.org

-----Original Message-----

From: Jay Vroom
Sent: Tuesday, April 25, 2017 5:21 PM
To: Sarah A. Greenwalt <greenwalt.sarah@epa.gov>
Cc: Janet Collins <jcollins@croplifeamerica.org>; Rachel Lattimore <RLattimore@croplifeamerica.org>; Beau Greenwood <BGreenwood@croplifeamerica.org>
Subject: Thanks for our ESA discussion this morning

Sarah

Thanks so much for your time today. We will get you the added details on the ESA cases we mentioned. Will also circle back with you after our other meetings this week.

Jay

Sent from my iPhone

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CENTER FOR BIOLOGICAL
DIVERSITY; PESTICIDE ACTION
NETWORK NORTH AMERICA,
non-profit organizations,
Plaintiffs-Appellants,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY,
Defendant-Appellee,

CROPLIFE AMERICA;
RESPONSIBLE INDUSTRY FOR A
SOUND ENVIRONMENT (“RISE”);
SOUTHERN CROP PRODUCTION
ASSOCIATION; WESTERN PLANT
HEALTH ASSOCIATION;
MIDAMERICA CROPLIFE
ASSOCIATION; AMERICAN FARM
BUREAU FEDERATION;
AMERICAN CHEMISTRY
COUNCIL; NATIONAL
AGRICULTURAL AVIATION
ASSOCIATION; NATIONAL
ALLIANCE OF FOREST OWNERS;
NATIONAL CORN GROWERS
ASSOCIATION; NATIONAL
COTTON COUNCIL; NATIONAL

No. 14-16977

D.C. No.
3:11-cv-00293-JCS

OPINION

2 CTR. FOR BIOLOGICAL DIVERSITY V. EPA

COUNCIL OF FARMER
COOPERATIVES; NATIONAL
POTATO COUNCIL; OREGONIANS
FOR FOOD AND SHELTER; USA
RICE FEDERATION; WASHINGTON
FRIENDS OF FARMS AND
FORESTS,

*Intervenor-Defendants-
Appellees.*

Appeal from the United States District Court
for the Northern District of California
Joseph C. Spero, Magistrate Judge, Presiding

Argued and Submitted May 9, 2016
San Francisco, California

Before: Kim McLane Wardlaw, Richard A. Paez,
and Carlos T. Bea, Circuit Judges.

Filed February 2, 2017

Opinion by Judge Richard A. Paez;
Dissent by Judge Bea

SUMMARY*

Environmental Law

The panel affirmed in part, and reversed in part, the district court's dismissal of plaintiffs' claims arising from their citizen suit alleging that the U.S. Environmental Protection Agency violated the Endangered Species Act ("ESA") when it registered certain pesticide active ingredients and pesticide products without undertaking consultation with the National Marine Fisheries Service and the United States Fish and Wildlife Service (collectively "the Service").

The ESA requires federal agencies to consult with the Service to ensure that their discretionary actions do not jeopardize endangered and threatened species, or adversely modify a listed species' critical habitat. The Federal Insecticide, Fungicide and Rodenticide Act charges the EPA with the obligation to register and reregister pesticide active ingredients and pesticide products.

Plaintiffs framed thirty-one failure-to-consult claims for relief with each claim centering on one pesticide active ingredient. With each pesticide active ingredient, plaintiffs identified four categories of agency actions which allegedly triggered the EPA's duty to consult under Section 7(a)(2) of the ESA, and these comprised the sub-claims.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Concerning plaintiffs' category one sub-claims, which identified the EPA's issuance of the Reregistration Eligibility Decisions as an agency action, the panel held that all category one sub-claims were properly dismissed by the district court as either time-barred or jurisdictionally barred. Specifically, the panel held that where, as here, the plaintiffs alleged that an agency failed to comply with the ESA's procedural requirements, the general six-year statute of limitations period, set forth in 28 U.S.C. § 2401(a), applied. The panel also held that an ESA Section 7 claim raised after the EPA undertook public notice and comment must comply with the jurisdictional provisions of the Federal Insecticide, Fungicide and Rodenticide Act, and a plaintiff must file a petition for review in the court of appeals within 60 days of the entry of the contested final order.

Concerning plaintiffs' category two sub-claims, which alleged that the EPA's continued discretionary control of the pesticide's registration constituted agency action, the panel affirmed the district court's dismissal of all category two sub-claims because they failed to identify an affirmative agency action that would trigger a Section 7 consultation.

Concerning plaintiffs' category three sub-claims, which alleged that the EPA's completion of pesticide reregistration for a specific pesticide active ingredient was an agency action, the panel held that the completion of the reregistration was simply a fact, and therefore it could not trigger Section 7 consultation. The panel affirmed the dismissal of category three sub-claims.

Concerning plaintiffs' category four sub-claims, which alleged that the EPA's approval of individual pesticide products was an agency action, the panel reversed the district court's dismissal of all category four sub-claims. The panel agreed with the district court that pesticide product reregistration was an affirmative agency action, but disagreed that those claims were barred by the collateral attack doctrine. The panel remanded for further proceedings.

Judge Bea dissented in part. Judge Bea agreed with most of the majority opinion, but dissented from the conclusion that the category four sub-claims were not a collateral attack on the EPA's prior approval of the pesticides in those products. Judge Bea would affirm the district court's dismissal of the category four sub-claims.

COUNSEL

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OPINION

PAEZ, Circuit Judge:

The Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) charges the Environmental Protection Agency (“EPA”) with the obligation to register and reregister pesticide active ingredients and pesticide products.¹ In this case, the Center for Biological Diversity and the Pesticide Action Network North America (collectively, “CBD”) allege that the EPA violated the Endangered Species Act (“ESA”) when it reregistered certain pesticide active ingredients and pesticide products without undertaking consultation with the

¹ The parties and the district court transpose several FIFRA terms. For example, the Second Amended Complaint uses the terms “active ingredient” and “pesticides” interchangeably to refer to chemicals used as “insecticides, herbicides, fungicides, rodenticides, fumigants, and other pesticides,” but it uses the phrase “products containing pesticides” to refer to the end-user product. 7 U.S.C. § 136(u) (noting a pesticide may be “any substance or mixture of substances” intended to prevent, destroy, repel, or mitigate any pest). Similarly, the district court interchangeably used the terms “pesticide,” “product,” and “pesticide product,” reasoning that FIFRA also interchanges those terms. *Ctr. for Biological Diversity v. EPA*, 65 F. Supp. 3d 742, 747 (N.D. Cal. 2014). We use “pesticide active ingredient” to refer to the chemical compound that gives a pesticide its effect, and we use “pesticide product” to refer to the end-user product.

National Marine Fisheries Service and the Fish and Wildlife Service (collectively, “the Service”) as required by 16 U.S.C. § 1536(a)(2) (“ESA Section 7” or “Section 7”). The object of CBD’s lawsuit is to require the EPA to undertake consultation with the Service regarding the impact of the reregistration process of pesticide active ingredients and pesticide products on endangered or threatened species.

We must decide three core issues. First, we must reconcile the disparate limitations periods and jurisdictional provisions of the ESA and FIFRA for citizen suits that challenge the EPA’s failure to consult with the Service as required by ESA Section 7 when reregistering pesticide active ingredients and pesticide products. Second, we must determine whether plaintiffs alleged any affirmative agency actions by the EPA that triggered the EPA’s obligation to undertake Section 7 consultation with the Service. And third, we must decide whether any of CBD’s claims are barred by the collateral attack doctrine.

On each of these core issues, the district court ruled in favor of the EPA.² The court, however, granted CBD leave to amend to add facts that would demonstrate that the reregistration of pesticide products, although affirmative agency actions, were not simply impermissible collateral attacks on prior Reregistration Eligibility Decisions’ (“RED”) analyses or conclusions. CBD declined to amend. At CBD’s request, however, the district court entered a final judgment

² The district court also dismissed in part, without leave to amend, Claims for Relief thirty-two through seventy-four. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 772. Those claims are not at issue in this appeal.

under Federal Rule of Civil Procedure 54(b) for the thirty-one failure-to-consult Claims for Relief. CBD timely appealed.

Although we agree with many of the district court's rulings in this complex environmental case, we conclude that the court erred in its application of the collateral attack doctrine and in requiring CBD to amend the operative Complaint. We therefore affirm in substantial part, reverse in part, and remand for further proceedings.

I.

A.

CBD filed a citizen suit in district court alleging that the EPA had failed to comply with the ESA's consultation requirement in its ongoing involvement with 382 pesticides. *Ctr. for Biological Diversity v. EPA*, No. 11-cv-00293-JCS, 2013 WL 1729573, at *4 (N.D. Cal. Apr. 22, 2013); *see* ESA § 7, 16 U.S.C. §§ 1536(a) (consultation requirement), 1540(g) (citizen suit provision). Relying on the ESA's jurisdictional provisions regarding citizen suits, CBD asserted that the district court had jurisdiction over the alleged claims. *Ctr. for Biological Diversity*, 2013 WL 1729573, at *14; 16 U.S.C. §§ 1540(g)(1) ("The district courts shall have jurisdiction . . . to enforce any [ESA] provision or regulation, or to order the Secretary to perform such act or duty . . ."), 1540(g)(3)(A). Although CBD framed the Complaint as an enforcement action under the ESA, its Section 7 claims effectively challenged the EPA's final pesticide product reregistration decisions under FIFRA. In the course of reregistering pesticide products, the EPA issues a RED for each pesticide active ingredient included in the pesticide product.

The EPA and Intervenors³ (collectively, “Defendants”) filed a motion to dismiss for (1) failure to state a claim under the ESA, (2) lack of subject matter jurisdiction under FIFRA, and (3) lack of Article III standing. *Ctr. for Biological Diversity*, 2013 WL 1729573, at *1. In its Complaint, CBD alleged that the “EPA retains ongoing discretionary control and involvement over all of these pesticides, which constitute[] ‘agency action’ subject to consultation under Section 7(a)(2) of the ESA.” *Ctr. for Biological Diversity*, 65 F. Supp. 3d 742, 752 (N.D. Cal. 2014) (emphasis omitted). Dismissing the Complaint with leave to amend, the district court faulted CBD for failing to allege any affirmative agency action by the EPA, as required by *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012) (en banc), that would necessitate consultation with the Service. *Ctr. for Biological Diversity*, 2013 WL 1729573, at *8–10. The district court held that “[m]ere discretionary control and involvement” is not enough to trigger ESA Section 7 consultation. *Id.* at *10. The court also addressed subject matter jurisdiction, standing, and the statute of limitations, but reserved resolution of these issues until CBD filed an amended complaint. *See id.* at *12–22. The district court directed CBD to allege a specific affirmative act by the EPA

³ A number of pesticide active ingredient and pesticide product registrants successfully moved to intervene. Intervenors included CropLife America, Responsible Industry for a Sound Environment, Southern Crop Production Association, Western Plant Health Association, Mid America CropLife Association, American Farm Bureau Federation, American Chemistry Council, National Agricultural Aviation Association, National Alliance of Forest Owners, National Corn Growers Association, National Cotton Council, National Council of Farmer Cooperatives, National Potato Council, Oregonians for Food and Shelter, USA Rice Federation, Washington Friends of Farms and Forests, and Reckitt Benckiser LLC. Reckitt Benckiser later withdrew.

that would trigger Section 7 consultation for each of the alleged pesticide active ingredients or pesticide products. *Id.* at *10.

Subsequently, CBD filed a hefty 437-page Amended Complaint.⁴ In response, Defendants moved for a more definite statement under Rule 12(e), asserting that they could not properly respond to the Amended Complaint because CBD's allegations were too vague and ambiguous. Ruling on the motion, the district court agreed with Defendants that CBD's Amended Complaint was "vague and ambiguous" because it failed to specify which affirmative acts by the EPA triggered ESA Section 7 consultation. The court ordered CBD to clarify its allegations and explained that "[t]he affirmative agency actions must be clearly identified so [Defendants] may fairly evaluate whether to assert a facial challenge to standing, statute of limitations or jurisdiction . . . [and] [t]he affirmative acts must also appear on the face of the Complaint."

In response to the court's order, CBD filed another weighty 464-page Second Amended Complaint, in which it alleged the precise actions by the EPA that required Section 7 consultation. Defendants again moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. Defendants identified four bases for dismissal. First, Defendants argued that the statute of limitations barred any challenge to a RED issued prior to January 20, 2005. Second, they argued that FIFRA's jurisdictional provisions, 7 U.S.C. § 136n(a)–(b), controlled, depriving the district court of jurisdiction for any reregistration decision made after notice and comment.

⁴ The original Complaint was a mere thirty-four pages.

Third, Defendants argued that ongoing discretionary control and involvement over pesticides do not constitute affirmative action that triggers Section 7 consultation. Fourth, Defendants argued that CBD's allegations challenging individual product reregistrations were nothing more than an improper collateral attack on the underlying REDs, and therefore barred. As explained below, the district court granted in part and denied in part Defendants' motion to dismiss. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 772.

B.

To guide our discussion of the district court's ruling as well as facilitate our own analysis, we briefly explain how CBD framed the thirty-one failure-to-consult Claims for Relief in the Second Amended Complaint.

Each claim centers on one pesticide active ingredient.⁵ For each pesticide active ingredient, CBD "identif[ies] four categories of 'agency actions' which allegedly trigger the EPA's duty to consult under [S]ection 7(a)(2)." *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 755. In our discussion below, we refer to each of these categories as a "category one, two, three, or four" sub-claim for relief. The four categories are identical for all thirty-one Claims for Relief. Category one sub-claims identify "the EPA's issuance of the RED or amended RED" as an agency action, and provide a

⁵ Those active ingredients include: 1,3-dichloropropene, 2,4-D, salts and esters, acephate, alachlor, atrazine, bensulide, bromadiolone, captan, carbaryl, chlorothalonil, chlorpyrifos, diazinon, dicamba and salts, diuron, ethoprop, MCPA, salts and esters, methomyl, metolachlor and isomers, metribuzin, naled, oxydemeton-methyl, oxyfluorfen, paraquat dichloride, pendimethalin, phorate, phosmet, propanil, propargite, S,S,S-tributyl phosphorotrithioate, thiobencarb, and trifluralin.

date on which the EPA issued the RED or amended it. *Id.* Category two sub-claims allege that the EPA’s “continued discretionary control and involvement in this [pesticide active ingredient’s and pesticide product’s] registration” constitute agency action. *Id.* (internal quotation marks omitted). Category three sub-claims allege that the “EPA’s completion of [pesticide] product reregistration for [a] [specific] pesticide [active ingredient]” is an agency action. *Id.* (internal quotation marks omitted). Each such sub-claim provides the date for when product reregistration was completed. And, finally, category four sub-claims allege that the “EPA’s approvals of [pesticide] products containing [a] pesticide [active ingredient]” constitute an agency action and provide dates for when the EPA approved each pesticide product’s reregistration. *Id.* (internal quotation marks omitted). In ruling on Defendants’ motion to dismiss, the district court analyzed the four categories of sub-claims separately. The court began with category one sub-claims—the issuance of the RED or amended RED—and dismissed all thirty-one as either time-barred or jurisdictionally barred. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 756–57. The district court concluded that because the ESA does not provide a limitations period for Section 7 challenges, it would apply the general six-year statute of limitations for civil actions contained in 28 U.S.C. § 2401(a). *Id.* at 756. Applying that statute of limitations, the court determined that fifteen of the thirty-one alleged REDs were time-barred.⁶ *Id.*

⁶ These were the fourth, eighth, tenth, fourteenth, sixteenth, seventeenth, eighteenth, nineteenth, twenty-second, twenty-third, twenty-fourth, twenty-seventh, twenty-eighth, thirtieth, and thirty-first Claims for Relief.

Next, the court turned to whether there was subject matter jurisdiction for the sixteen category one sub-claims that remained. *Id.* The court concluded that because CBD's claims were "inextricably intertwined" with the EPA's pesticide actions governed under FIFRA, [they were] subject to FIFRA's more specific jurisdictional provisions" *Id.* (citation omitted); see *Am. Bird Conservancy v. Fed. Commc'ns Comm'n*, 545 F.3d 1190, 1193 (9th Cir. 2008) ("*American Bird*"). In applying FIFRA's jurisdictional provision, 7 U.S.C. § 136n(a)–(b), the court reasoned that the review of any "registration actions that follow a notice and public comment period" falls within the exclusive jurisdiction of the court of appeals, and therefore ruled that it lacked subject matter jurisdiction over the remaining sixteen Claims for Relief. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 756–57; see *United Farm Workers v. EPA*, 592 F.3d 1080, 1082–83 (9th Cir. 2010) ("*UFW*"); see also *In re Pesticide Action Network N. Am.*, 798 F.3d 809, 811 (9th Cir. 2015) (applying *UFW*'s reasoning where petitioners sought to challenge the EPA's pesticide safety determinations). Because all of the remaining category one sub-claims involved REDs that the EPA issued after a period of notice and comment, the district court dismissed them for lack of subject matter jurisdiction. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 756–57.

The district court then addressed and rejected all of CBD's category two—"continued discretionary control"—sub-claims. *Id.* at 757–58. The court ruled that "[t]he retention of discretionary control is necessary but insufficient to trigger" the EPA's consultation with the Service. *Id.* at 758. The court reasoned, largely in line with our en banc opinion in *Karuk Tribe*, that although affirmative actions can be ongoing, CBD must allege an affirmative agency action

and maintaining discretionary control and involvement in a pesticide's registration is not sufficient. *Id.* at 757–58.

Next, the district court discussed and rejected all category three—the completion of pesticide product reregistration for a particular pesticide active ingredient—sub-claims. *Id.* at 758–59. The court concluded that completion of pesticide product reregistration “is not an affirmative act of any sort; it is a fact.” *Id.* at 758. The court therefore dismissed all thirty-one category three sub-claims. *Id.* at 759.

Finally, the district court addressed CBD's category four—reregistration of pesticide products—sub-claims. *Id.* at 759–60. Analyzing the statute governing reregistrations of pesticide products, 7 U.S.C. § 136a-1(g)(2)(C), the district court agreed with CBD that pesticide product reregistration is an affirmative agency action that triggers ESA Section 7 consultation. *Id.* at 760. However, the court also held that any category four sub-claim that fell within the statute of limitations and attacked a RED's analyses or conclusions was an impermissible collateral attack on the RED and therefore barred. *Id.* at 764. The court granted CBD leave to amend to clarify what new actions by the EPA, aside from analyses and conclusions contained in the RED, demonstrated that pesticide product reregistrations constituted an agency action for purposes of Section 7 consultation. *Id.* at 764. CBD declined to amend.

Following entry of a final judgment on Claims for Relief one through thirty-one pursuant to Rule 54(b), CBD timely appealed.⁷

II.

A.

1.

We begin with a brief description of the relevant aspects of both the ESA and FIFRA. The ESA seeks to protect and conserve endangered and threatened species and their habitats, and it reflects “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978); *see also Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 651 (2007) (“*Home Builders*”). It achieves that purpose, in part, by requiring federal agencies to consult with the Service to ensure their discretionary actions⁸ do not jeopardize endangered and threatened species, or adversely modify a listed species’ critical habitat. 16 U.S.C. § 1536(a); *see also Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687,

⁷ We review de novo dismissals for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted, as well as whether a claim is barred by a statute of limitations. *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1005 (9th Cir. 2011); *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007); *Rattlesnake Coal. v. U.S. Envtl. Prot. Agency*, 509 F.3d 1095, 1100 (9th Cir. 2007).

⁸ The ESA’s regulations define “agency action” to include “all activities or programs of any kind authorized, funded, or carried out . . . by Federal agencies in the United States.” 50 C.F.R. § 402.02.

692 (1995); *Karuk Tribe*, 681 F.3d at 1020. The ESA’s implementing regulations broadly construe “agency action” to include licensing and permitting programs, 50 C.F.R. § 402.02(c), as well as “actions directly or indirectly causing modifications to the land, water, or air.” *Id.* § 402.02(d).

Consultation allows agencies to draw on the expertise of “wildlife agencies to determine whether [an] action is likely to jeopardize a listed species” or its habitat, and “to identify reasonable and prudent alternatives” to avoid those harmful impacts. *Karuk Tribe*, 681 F.3d at 1020 (citing *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003)). An agency’s duty to consult, or to reinitiate consultation, applies whether an agency action is “ongoing” or “complete.” *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1086, 1086 n.12 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 293 (2016). Agencies must review their actions “at the earliest possible time to determine whether any action may affect listed species or critical habitat,” and those agencies must initiate formal consultation when such a determination is made. 50 C.F.R. § 402.14(a). When formal consultation is required, the Service must prepare a biological opinion advising whether the proposed agency action “affects the species or its critical habitat.” *Home Builders*, 551 U.S. at 652 (citing 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)). If the Service concludes that “the agency action would place the listed species in jeopardy or adversely modify its critical habitat,” the Service must provide “reasonable and prudent alternatives” to the proposed action. *Id.* (citing 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3)).

2.

FIFRA provides a comprehensive regulatory scheme for the use, sale, and labeling of pesticide active ingredients and pesticide products. *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1030 (9th Cir. 2005); *see* 7 U.S.C. §§ 136(a), (u) (defining “active ingredient” and “pesticide”). FIFRA establishes comprehensive procedures for the EPA’s registration, reregistration, and cancellation of registration of pesticide active ingredients and pesticide products. *Wash. Toxics Coal.*, 413 F.3d at 1030; *see also* 7 U.S.C. § 136a-d; *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991). No one may sell or distribute a pesticide product without the EPA’s approval, 7 U.S.C. § 136a(a), and manufacturers must submit their registration applications to the EPA and obtain authorization before introducing a pesticide product to the market. 7 U.S.C. § 136a; *Wash. Toxics Coal.*, 413 F.3d at 1030.

As part of the approval process, the EPA conducts an analysis that considers the “economic, social and environmental costs and benefits of the use of any pesticide.” *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001) (quoting *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir. 1984)). In conducting that analysis, the EPA must consider what are known as Paragraph 5 requirements provided in 7 U.S.C. § 136a(c)(5). That statute provides the following:

The [EPA] shall register a pesticide if [it] determines that, when considered with any restrictions imposed under subsection (d) of this section—

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this subchapter;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause adverse effects on the environment.

7 U.S.C. § 136a(c)(5). If the EPA determines that a pesticide product does not “increase the risk of unreasonable adverse effects on the environment” and satisfies the Paragraph 5 requirements,⁹ the EPA “shall register” that pesticide product. 7 U.S.C. §§ 136a(c)(3)(B)(i)(I), (c)(5).

In 1988, Congress passed legislation directing the EPA to “reregister . . . each registered pesticide [product] containing

⁹ The EPA’s final pesticide product registration or reregistration decision requires the exercise of agency discretion within the meaning of Section 7. For example, FIFRA requires the EPA to gather data to determine if the benefits of a particular pesticide product outweigh its “economic, social, and environmental costs.” 7 U.S.C. § 136a(c)(3)(A), (c)(5)(C); 7 U.S.C. § 136(bb). In some circumstances, ESA consultation may demonstrate that the “costs” of a particular pesticide product outweigh its benefits. The EPA must then use that consultative data to inform its final decision whether to decline to register a pesticide product or to limit a pesticide product’s use.

any active ingredient contained in any pesticide [product] first registered before November 1, 1984,” and it detailed a multi-phase reregistration process.¹⁰ Pub. L. No. 100-532, 102 Stat. 2654 (Oct. 25, 1988) (codified as amended at 7 U.S.C. § 136a-1(a)). That legislation also required pesticide registrants to notify the EPA of their intent to reregister their products, to identify “missing and inadequate data for such pesticide[]” products and to provide a proposed plan for filling any gaps in the data provided for reregistration review.¹¹ 7 U.S.C. §§ 136a-1(b)(2), (d)(3). “After the

¹⁰ The first phase of the reregistration process requires the EPA to list the active ingredients of the pesticide products that will be reregistered. 7 U.S.C. § 136a-1(b)(1); *see also id.* § 136a-1(c). The second phase requires the registrant to submit to the EPA notice of its intent to seek reregistration, to identify any missing or inadequate data for that pesticide product, and to disclose how the registrant will replace that missing or inadequate data. *Id.* §§ 136a-1(b)(2), (d)(3). The third phase requires the registrant to describe the research presented during initial registration, identify previously excluded studies, disclose new research regarding a pesticide product’s adverse effects and benefits, and certify that the registrant possesses or can access the raw data used to generate that research. *Id.* §§ 136a-1(b)(3), (e). The registrant also must summarize data from those studies and report the “chronic dosing, oncogenicity, reproductive effects, mutagenicity, neurotoxicity, teratogenicity, or residue chemistry” of any active ingredient submitted to the EPA prior to January 1, 1982. *Id.* § 136a-1(e)(1)(C). The fourth phase requires the EPA to conduct an independent, initial review consistent with 7 U.S.C. § 136a-1(f), and if necessary, to request additional data from the registrant. *Id.* § 136a-1(b)(4). The fifth phase includes both a “thorough examination of all data” and the actual product reregistration, which considers whether the pesticide product satisfactorily meets the requirements of Paragraph 5. *Id.* § 136a-1(g).

¹¹ In 1996, Congress further amended FIFRA to include periodic registration review every 15 years, so the EPA could evaluate whether new research regarding pesticide products’ harms warranted restricting a pesticide product’s use or canceling its registration. Food Quality

registrant signals its intent to reregister a pesticide [product], [the EPA] conducts science reviews, develops a risk assessment and publishes it for public comment, and issues a Reregistration Eligibility Decision (RED) [evaluating the active ingredient in the pesticide product].” U.S. EPA, *Evaluation of the U.S. Pesticide Product Reregistration Process: Opportunities for Efficiency and Innovation*, at 1-1 (2007) (“*Evaluation*”).¹² The RED “summarizes the risk assessment conclusions and outlines any risk reduction measures for the pesticide [active ingredient] to continue to be registered in the U.S.” *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 749 (internal quotation marks omitted); *see also* 7 U.S.C. § 136a-1(g)(2)(a)). “After [the EPA] publishes a RED, it then must reregister each of the individual pesticide products that contain the active ingredient. This final step in the process [is the] pesticide product reregistration.” *Evaluation* at 1-1.

B.

Against that legal landscape, we turn to the thirty-one failure-to-consult Claims for Relief at issue in this appeal. We begin with the category one sub-claims—the issuance of REDs. We assume, but do not hold, that the EPA’s issuance

Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (Aug. 3, 1996) (codified at 7 U.S.C. § 136a(g)); H.R. Rep. 104-669 (July 23, 1996), *reprinted at* 1996 U.S.C.C.A.N. 1268, 1270 (noting that original pesticide product registrations, and in some cases their reregistrations, were conducted “when tests for the safety of [pesticide product] residues were less sophisticated.”).

¹² Report available at <https://www.epa.gov/sites/production/files/2015-09/documents/eval-epa-pesticide-product-reregistration-process.pdf> (last visited Jan. 23, 2017).

of a RED is an agency action that triggers ESA Section 7 consultation. We need not decide whether the issuance of a RED is a triggering action because we hold that all category one sub-claims were properly dismissed by the district court as either time-barred or jurisdictionally barred.

1.

We begin with a discussion of the EPA's statute of limitations defense. Neither FIFRA nor the ESA provides a limitations period when a Section 7 citizen suit filed in a district court challenges the EPA's decision to register or reregister a pesticide active ingredient or pesticide product. The issue of which limitations period to apply in those circumstances is a question of first impression in the Ninth Circuit. CBD argues that no limitations period applies to its claims because the EPA has a continuing duty to comply with Section 7, and its failure to initiate consultation constitutes a "continuing violation" that excuses any limitations period. We disagree.

We have held that when a statute does not specify a limitations period, federal courts must apply the general statute of limitations that most closely addresses the basis for the plaintiff's claim. For example, *United States v. Dae Rim Fishery Co.*, 794 F.2d 1392, 1394 (9th Cir. 1986), held that the limitations period for claims sounding in contract and quasi-contract was governed by the six-year statute of limitations set forth in 28 U.S.C. § 2415(a). Similarly, *Wind River Mining Corp v. United States*, 946 F.2d 710, 712–13 (9th Cir. 1991), held that the six-year statute of limitations set forth in 28 U.S.C. § 2401(a) provided the limitations period for actions brought pursuant to the Administrative Procedure Act ("APA"), *see* 5 U.S.C. §§ 701–706. *See also N. Cty.*

Cnty. All., Inc. v. Salazar, 573 F.3d 738, 742–43 (9th Cir. 2009) (applying *Wind River* to APA claims regarding licensing and construction); *Nw. Env'tl. Advocates v. U.S. Env'tl. Prot. Agency*, 537 F.3d 1006, 1018–19 (9th Cir. 2008).

Where, as here, a plaintiff alleges that an agency failed to comply with the ESA's procedural requirements, we apply the general six-year statute of limitations set forth in 28 U.S.C. § 2401(a).¹³ *Wind River*, 946 F.2d at 713 (“As a general statute of limitation, [Section 2401] should apply to actions . . . [that] challenge a [final agency decision] on the basis of procedural irregularity.”). This holding comports with our previous case law, which provides that when a plaintiff brings a substantive ESA claim under the APA, we apply the statute of limitations set forth in the substantive statute. *See, e.g., Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 904 (9th Cir. 2012) (holding that the six-year statute of limitations applied to claims challenging the application of a regulation to a specific circumstance); *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 438 F.3d 937, 942–43, 946–49 (9th Cir. 2006) (applying the Magnuson-Stevens Act’s shorter statute of limitations period to a claim challenging the “terms and conditions” of a fishery permit); *Jones v. Gordon*, 792 F.2d 821, 824–25 (9th Cir. 1986) (holding that the six-year limitations period applied to a claim that an agency “failed to comply with the procedural requirements” of an environmental statute).

Thus, we affirm the district court’s dismissal of the category one sub-claims alleged in the fourth, eighth, tenth,

¹³ Section 2401(a) provides in relevant part, “[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”

fourteenth, sixteenth, seventeenth, eighteenth, nineteenth, twenty-second, twenty-third, twenty-fourth, thirtieth, and thirty-first Claims for Relief. The district court properly dismissed those category one sub-claims because the REDs alleged in those claims had all been issued prior to January 20, 2005, over six years prior to the filing of CBD's original Complaint. In addition, we dismiss sub-claim one of the first Claim for Relief as barred by the statute of limitations.¹⁴

With respect to sub-claim one of the twenty-eighth Claim for Relief, however, we remand to the district court to resolve a factual dispute. The district court dismissed this sub-claim as time-barred based on the RED's issuance date of September 2001. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 756. However, the Second Amended Complaint alleged an amendment to that RED in June of 2008. It is unclear from the record before the district court whether the amendment was sufficiently substantive to be an independent triggering action. The government acknowledged that the amendment added two minor labeling requirements, and we therefore remand sub-claim one of the twenty-eighth Claim for Relief for the district court to determine whether those

¹⁴ The district court dismissed sub-claim one of the first Claim for Relief as jurisdictionally barred, but this ruling appears incorrect in light of the district court record. This sub-claim should have been dismissed as time-barred because the RED issued in September of 1998. Although the RED was updated in August of 2008, as the government explained in its motion to dismiss the Second Amended Complaint, the update was nothing more than a "fact sheet" that did not actually update the RED but merely described measures required by the RED. Compare https://www3.epa.gov/pesticides/chem_search/reg_actions/reregistration/red_PC-029001_1-Sep-98.pdf (last visited Jan. 23, 2017) (RED), with https://archive.epa.gov/pesticides/reregistration/web/html/1,3-dichloropropene_fs.html (last visited Jan. 23, 2017) (updated RED Fact Sheet). Notably, CBD does not contest the government's explanation.

additions to the RED in 2008 constitute an affirmative agency action triggering Section 7 consultation.

2.

Next, we must decide whether there was subject matter jurisdiction for the district court to properly hear the sixteen remaining category one sub-claims.

Both the ESA and FIFRA contain citizen suit provisions, but those provisions offer conflicting requirements for whether a case should be filed in the district court or in the court of appeals. The ESA allows any person, including entities, to:

commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof

16 U.S.C. § 1540(g)(1). The ESA citizen suit provision also states, “The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty” 16 U.S.C. § 1540(g)(1).

Similarly, FIFRA allows private individuals and entities to seek judicial review of the EPA’s registration and reregistration decisions, but it bifurcates which claims may be

brought before the district court and which claims must be presented to the court of appeals. When a plaintiff seeks review of “the refusal of the Administrator to cancel or suspend a registration or to change a classification not following a hearing and other final actions of the Administrator not committed to the discretion of the Administrator by law,” the suit must be filed in the district court. 7 U.S.C. § 136n(a). If the claim challenges “the validity of any order issued by the Administrator following a public hearing,”¹⁵ then a petition for review must be filed “in the United States court of appeals for the circuit wherein [the petitioner] resides or has a place of business, within 60 days after the entry of such order” *Id.* § 136n(b); *see also UFW*, 592 F.3d at 1082–84 (holding that publication of notice and comment in the Federal Register constitutes a “public hearing” for the purposes of determining FIFRA jurisdiction). Review of agency actions taken after a “public hearing” is committed to the “exclusive jurisdiction” of the courts of appeals. 7 U.S.C. § 136n(b).

We have held that “when two jurisdictional statutes draw different routes of appeal, the well-established rule is to apply only the more specific legislation.” *Am. Bird*, 545 F.3d at 1194 (citing *Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989) (internal quotation marks omitted)). In *American Bird*, plaintiffs filed suit in the

¹⁵ Although FIFRA’s statutory language does not contemplate notice and comment, beginning in 2004, the EPA adopted a public participation policy that it intended to apply during its pesticide active ingredient and pesticide product registration and reregistration review processes. 69 Fed. Reg. 26,819 (May 14, 2004) (final notice). The EPA reasoned that public participation during reregistration and review would “increase transparency and stakeholder involvement in the development of pesticide risk assessments and risk management decisions.” 69 Fed. Reg. at 26,819.

district court, arguing that the Federal Communications Commission (“FCC”) had failed to engage in Section 7 consultation when it issued licenses for seven communications towers. 545 F.3d at 1191–92. The Federal Communications Act and the ESA provided separate judicial review provisions, and the Communications Act’s provisions vested federal courts of appeals with “exclusive jurisdiction” over actions to “enjoin, set aside, annul, or suspend any order of” the FCC. *Id.* at 1193 (citing 47 U.S.C. § 402(a)) (internal quotation marks omitted).

American Bird explained that although the plaintiffs sought procedural relief, the heart of their claims challenged the FCC’s actions under the Communications Act. *Id.* at 1193. The court opined that plaintiffs’ claims, although nominally based in the ESA, challenged the FCC’s grant of cell tower licenses. 545 F.3d at 1192–95 (“*American Bird* attempts to bypass Congress’ . . . system of review . . . by characterizing its suit as a challenge to the agency’s compliance with federal environmental laws rather than to the agency’s ultimate order.”). *American Bird* reasoned that when a Section 7 claim challenges an agency order issued pursuant to a substantive statute with a “more specific” judicial review scheme than the ESA, courts must evaluate the plaintiff’s claims under the jurisdictional provisions of that substantive statute. *Id.* at 1194 (citing *Cal. Save Our Streams Council*, 887 F.2d at 911). Although *American Bird* resolved jurisdictional conflicts between the ESA and the Communications Act, its reasoning applies to the disparate jurisdictional provisions at issue here.

When a plaintiff’s claims are inextricably intertwined between two statutes—such as the ESA and FIFRA—and those statutes contain conflicting jurisdictional provisions,

American Bird requires plaintiffs to comply with the more specific statute. *Id.* at 1194–95. As the district court noted, when Section 7 consultation follows public notice and comment, that consultation informs the validity of the EPA’s determination whether to reregister a pesticide. Here, CBD’s Section 7 category one sub-claims inherently challenge the validity of the EPA’s final registration and reregistration orders.

Thus, we hold that for the purposes of FIFRA, a Section 7 claim raised after the EPA undertakes public notice and comment must comply with FIFRA’s jurisdictional provisions. A plaintiff bringing a Section 7 claim challenging “the validity of [the Administrator’s FIFRA] order” after a period of notice and comment in the Federal Register must file a petition for review in the court of appeals within 60 days of the entry of the contested final order.¹⁶

On the basis of the district court record, we conclude that fifteen of the sixteen remaining category one sub-claims were properly dismissed by the district court for lack of subject matter jurisdiction.¹⁷ In the second, third, fifth, sixth,

¹⁶ CBD expresses concern that the ESA’s 60-day pre-filing requirement appears to conflict with FIFRA’s 60-day statute of limitations. Compare 16 U.S.C. § 1540(g)(2)(A)(i), with 7 U.S.C. § 136n(b). Although we do not decide the issue, *Alliance for the Wild Rockies v. U.S. Department of Agriculture*, 772 F.3d 592, 603–04 (9th Cir. 2014), which addressed a similar situation, may be useful in understanding how these two jurisdictional statutes can co-exist. See also *Washington v. Daley*, 173 F.3d 1168, 1170 n.16 (9th Cir. 1999); *Am. Bird*, 545 F.3d at 1194 n.2, 1194–95.

¹⁷ As discussed *supra* at footnote 14, sub-claim one of the first Claim for Relief should have been dismissed as time-barred.

seventh, ninth, eleventh, twelfth, thirteenth, fifteenth, twentieth, twenty-first, twenty-fifth, twenty-sixth, and twenty-ninth Claims for Relief the issuance of the subject REDs were all preceded by a public comment and notice period published in the Federal Register. Further, sub-claim one in the twenty-seventh Claim for Relief is dismissed for lack of jurisdiction.¹⁸ Therefore, CBD should have filed a petition in the court of appeals to obtain judicial review of those sub-claims.

In sum, we affirm the district court's dismissal of all category one sub-claims contained in Claims for Relief one through thirty-one.

C.

We turn to the category two sub-claims, which allege that the “continued discretionary control and involvement in [a] pesticide [active ingredient’s and pesticide product]’s registration” constitute “ongoing agency action.” *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 755 (internal quotation marks omitted). We disagree and therefore affirm the district court’s dismissal of all category two sub-claims.

CBD argues that because the EPA has an ongoing duty to comply with the ESA, its failure to undertake Section 7 consultation serves as an “ongoing violation” of the ESA.

¹⁸ The district court dismissed sub-claim one of the twenty-seventh Claim for Relief as time-barred based on the the EPA’s issuance of the RED in September 2003. Although the court correctly dismissed the sub-claim, it did so for the wrong reason. There was an amendment to the RED in March of 2006, but as the government explains, that amendment was issued after public notice and comment, thus the sub-claim was not time-barred but rather jurisdictionally barred.

CBD reasons that the EPA's "ongoing violation" provides an adequate basis for a Section 7 claim, and consequently, a plaintiff should not be required to identify a separate and affirmative discretionary action for a Section 7 claim to accrue. As the district court noted, CBD's construction is at odds with controlling precedent, which provides that an ESA claim accrues only when an agency takes discretionary, affirmative action. *Karuk Tribe*, 681 F.3d at 1021 ("inaction" is not 'action' for [16 U.S.C.] Section [1536](a)(2) purposes.") (citing *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1107–08 (9th Cir. 2006)). In *Karuk Tribe*, we held that our "'agency action' inquiry is two-fold. First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species." *Id.* at 1021.

CBD conflates an ongoing duty with an ongoing violation. An agency that retains regulatory authority over a program has a continuing obligation to comply with the ESA. *Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1087 (citing *Wash. Toxics Coal.*, 413 F.3d at 1030–33). In *Washington Toxics Coalition*, we held that the EPA was not excused from complying with the ESA when it registered fifty-four pesticides without Section 7 consultation. 413 F.3d at 1033 ("Because [the] EPA has continuing authority over pesticide regulation, it has a continuing obligation to follow the requirements of the ESA."); *see also Forest Guardians v. Johanns*, 450 F.3d 455, 464–65 (9th Cir. 2006) (explaining agencies' ongoing duty to reinitiate ESA consultation). Similarly, in *Cottonwood Environmental Law Center*, we held that the U.S. Forest Service violated the ESA when it failed to reinitiate consultation after the U.S. Fish and

Wildlife Service designated critical habitat on 10,000 square miles of National Forest land. 789 F.3d at 1078, 1086–88, 1092.

Although the EPA has an ongoing duty to comply with the ESA, under *Karuk Tribe*, Section 7 consultation still must be triggered by an affirmative agency action. *Id.* In other words, “[t]he retention of discretionary control is necessary but insufficient to trigger an agency’s duty to . . . initiate consultation.” *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 758. Moreover, as the district court noted, although affirmative agency actions can be ongoing, “the retention of discretionary control over previously issued pesticide licenses” is not such an ongoing action. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 758 (citing *Karuk Tribe*, 681 F.3d at 1021); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173–74 (1978). *Karuk Tribe* squarely controls this case; because category two sub-claims fail to identify an affirmative agency action that would trigger a Section 7 consultation, we affirm the district court’s dismissal of all category two sub-claims alleged in Claims for Relief one through thirty-one. *See Karuk Tribe*, 681 F.3d at 1021.

D.

Next, we turn to the category three sub-claims that allege that the EPA’s completion of all pesticide product reregistrations for a particular pesticide active ingredient is an affirmative agency action that triggers Section 7 consultation. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 755. We agree with the district court that the completion of pesticide product reregistration is simply a fact, and therefore it cannot trigger Section 7 consultation. *Id.* at 758. The date on which all reregistrations of pesticide products that contain a

particular pesticide active ingredient have been completed, is simply that, a date. As the district court explained, CBD “may not base their failure-to-consult claims on the EPA’s ‘completion’ of product reregistration—as opposed to the actual registration actions.” *Id.* at 759. As a result, we affirm the dismissal of all category three sub-claims alleged in Claims for Relief one through thirty-one.

E.

This brings us to the final category four sub-claims, in which CBD contends that the EPA’s approval of individual pesticide products is an affirmative agency action triggering ESA Section 7 consultation. *Id.* at 755. These category four sub-claims are complicated by the fact that Defendants contend that CBD’s timely reregistration claims of pesticide products are nothing more than collateral attacks on the underlying REDs that were already dismissed, and are therefore impermissible. As detailed below, we agree with the district court that pesticide product reregistration is an affirmative agency action, but we disagree that those claims are barred by the collateral attack doctrine and require further amendments to the Second Amended Complaint.

1.

As discussed *supra* at part II.A.2 and footnote 10, the EPA uses a multi-phase reregistration process, which includes a phase-five reregistration of pesticide products. 7 U.S.C. §§ 136a-1(b), (g). At an earlier stage in the reregistration process, the EPA publishes a RED. 7 U.S.C. § 136a-1(g)(2)(A); *see also Evaluation* at 1-4. After the EPA issues the RED, it “collects both product-specific data and confirmatory data on the active ingredient as identified in the

RED.” *Id.* at 1-5; *see also* 7 U.S.C. § 136a-1(g)(2)(B)(i) (“Before reregistering a pesticide, the [EPA] shall obtain any needed product-specific data regarding the pesticide . . .”). In order to ultimately reregister a pesticide product, the EPA must weigh all of the data and determine whether each pesticide product comports with the Paragraph 5 requirements contained in Section 136a(c)(5). 7 U.S.C. § 136a-1(g)(2)(C).

The process of gathering data after a RED has issued can be lengthy; sometimes more than ten years will have elapsed between the issuance of a RED and the completion of reregistration of all pesticide products containing the RED’s pesticide active ingredient. According to the *Evaluation*, “[w]ith regard to a RED, on average, it took about 47 months to reregister all products covered by a RED [and] [t]he average maximum time needed for reregistering all products covered by a RED was about 76 months.” *Id.* at 3-5. Importantly, as the statute and the EPA’s own process demonstrate, it is clear that publication of a RED for a pesticide active ingredient is not the agency’s final decision on reregistration of a pesticide product. *Id.* at vi. A RED does not contain all the research upon which the EPA relies when reaching its final pesticide product reregistration decision. *Id.* at 1-4, 1-5. As such, the reregistration of an individual pesticide product is its own triggering action.

We note, consistent with our holding in section II.B.1–2, that any claim based on a product reregistration that occurred before January 20, 2005 would be time-barred, and any claim involving a product reregistration after public notice and comment in the Federal Register would be jurisdictionally barred. The parties do not suggest that any of the category four sub-claims for relief are barred by the statute of limitations or are jurisdictionally barred. Nonetheless, we

leave it to the district court to address any such issues the parties might raise on remand.

2.

The collateral attack doctrine prevents litigants from “relitigat[ing] the merits of . . . previous administrative proceedings” or “evading . . . established administrative procedures” by raising a claim that is “inescapably intertwined with a review of the procedures and merits surrounding” an underlying agency order. *Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006) (internal quotation marks and citations omitted, alteration in original); *see also United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012) (applying the collateral attack doctrine to APA claims). At its core, the doctrine prohibits a plaintiff from using a later order that implements a prior agency action as a vehicle to undo the underlying action or order. *Americopters*, 441 F.3d at 736.

As noted, Defendants argue, and the district court agreed, that the category four sub-claims alleging the reregistration of pesticide products as independent triggering actions are simply collateral attacks on the issuance of the REDs, which are time-barred or jurisdictionally barred. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 760–64. We disagree.

The collateral attack doctrine is not at issue here; CBD does not seek to unravel a prior agency order, nor does it attempt to challenge “any of the analyses or conclusions

contained in the RED[s].”¹⁹ *Id.* at 764. CBD contends that the final reregistration of a pesticide product triggers the ESA’s Section 7 consultation obligation because the EPA does not “rubber stamp” the pesticide product reregistration in light of the RED. The district court agreed, detailing the differences between the EPA’s process for issuing a RED and the separate process for approving a pesticide product. *Id.* at 762–63. As a result, the district court declined to hold that “as a matter of law, an attack on a post-RED product reregistration is a collateral attack on the RED.” *Id.* at 763. We agree; as discussed *supra*, see section II.A.2, under the governing statute, 7 U.S.C. § 136a-1(g), a product reregistration incorporates data not available during the process for issuing a RED, and necessarily involves a determination distinct from those made during the RED process because a pesticide active ingredient and a pesticide product are not the same.

Neither the district court nor the dissent disputes this distinction. *Id.*; Diss. at 41. Nonetheless, the district court and the dissent would require CBD to allege facts specific to each pesticide product demonstrating how each product reregistration raises new ESA compliance issues. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 764; Diss. at 41–42. Such specificity is unwarranted at this stage of the proceedings. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to

¹⁹ The district court’s reliance on *Pacific Gas & Electric v. FERC*, 464 F.3d 861 (9th Cir. 2006), is unavailing. See *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 762–64. The EPA’s reregistration of a product is neither a clarification nor a modification of the underlying RED; it is a separate and distinct action. See *Pac. Gas & Elec.*, 464 F.3d at 868–69.

state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Here, CBD has pled a facially valid claim under the ESA because it has demonstrated that, as a matter of fact, “the issuance of a RED is an interim step in the process of reregistering the pesticide products” and therefore the reregistering of a pesticide product involves multiple other steps, thus triggering its own consultation requirement. *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 764.

CBD is not required to allege facts beyond what it already has alleged in its Second Amended Complaint. CBD notified the EPA of its intent to file suit, and the Second Amended Complaint alleges facts sufficient to support the proposition that pesticide product reregistrations are affirmative agency actions, distinct from the issuance of REDs, that trigger a Section 7 consultation obligation.²⁰ Neither the ESA nor FIFRA requires more. They certainly do not require CBD to remind the EPA to engage in ESA consultation at every phase of the pesticide active ingredient and pesticide product reregistration process, nor do those statutes require CBD to contest a RED to preserve failure-to-consult claims challenging final pesticide product reregistration decisions.

Consequently, in the context of this case, the collateral attack doctrine is inapposite. Accordingly, we reverse the

²⁰ The district court held that “to the extent that Plaintiffs seek to challenge any of the analyses or conclusions contained in the RED, this court has no jurisdiction to entertain such a claim.” *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 764. We agree, but as pled, CBD is not challenging the analyses or conclusions contained in the RED, but rather the affirmative action of reregistering a pesticide product.

district court's dismissal of all category four sub-claims alleged in Claims for Relief one through thirty-one.

III.

We affirm the district court's order in substantial part; all category one, two, and three sub-claims alleged in Claims for Relief one through thirty-one were properly dismissed. We reverse the dismissal of all category four sub-claims alleged in Claims for Relief one through thirty-one in which the reregistration took place after January 20, 2005, and in which there was no public notice and comment in the Federal Register. We remand for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

BEA, Circuit Judge, dissenting in part:

Although I agree with most of the majority opinion, I respectfully dissent from the conclusion reached in Part II.E that the category four sub-claims in the Second Amended Complaint ("SAC"), which challenge the approval of pesticide products by the Environmental Protection Agency ("EPA"), were not a collateral attack on the EPA's prior approval of the pesticides in those products. The majority focuses on the distinct processes the EPA uses to approve pesticides and to approve pesticide products. However, the category four sub-claims, *as pleaded*, are an impermissible collateral attack because those sub-claims challenge the EPA's approval of products *simply because those products*

contain the pesticides the SAC alleges were improperly approved previously.

Whenever the EPA considers taking an “agency action,” the Endangered Species Act (“ESA”) Section 7 requires the EPA to consult with the National Marine Fisheries Service and the Fish and Wildlife Service (collectively, “the Service”) if that action “may affect” a listed endangered species or its habitat. *See Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (citing 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.14(a)). In the SAC, the Center for Biological Diversity and the Pesticide Action Network North America (collectively, “CBD”), challenge the EPA’s reregistration eligibility determinations (“REDs”) for many different pesticides, alleging that the EPA failed to consult with the Service before issuing the REDs. According to CBD, approving the pesticides through the REDs “may affect” various listed endangered species or their habitats.

CBD structured the SAC around each challenged pesticide. Each Claim for Relief has four sub-claims. The category one sub-claim is the challenge to the RED. The category two and category three sub-claims challenge the EPA’s “continued discretionary control and involvement” in the pesticide’s registration and the EPA’s “completion of product reregistration” for the pesticide in question. I agree with the majority that the district court properly dismissed most of the category one sub-claims as time barred or jurisdictionally barred and that the category two and three sub-claims were properly dismissed because they did not challenge affirmative agency actions.

The final part of each Claim for Relief, the category four sub-claim, challenges the EPA’s approval of products

containing the particular pesticide in question. As one of the category four sub-claims states: “[T]he following specific EPA actions on 1,3 dichloropropene are subject to this complaint and require EPA to consult under Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2): . . . EPA’s approvals of products containing this pesticide, which are listed with dates in the table at Paragraph 120.” Notably, Paragraph 120 references all products in the EPA’s online Pesticide Product Label System that contain 1,3-dichloropropene. Thus, the category four sub-claims challenge the EPA’s approval of *all products that contain a particular pesticide*.

The SAC refers to these pesticide product approvals as one of four “actions involving” a particular pesticide. The SAC states that because *all of the four* actions “may affect the listed species in Exhibit A and their designated critical habitat, EPA is required to initiate consultation with the Service.” Unsurprisingly, Exhibit A lists endangered species “that may be affected” *by a particular pesticide*, **not** endangered species that “may be affected” by particular pesticide products. Thus, the SAC does not differentiate between the four challenged “actions.” According to the SAC, all of those actions “may affect” endangered species or their habitats because all of those actions involve a particular pesticide that may affect endangered species or their habitats. Therefore, the SAC does not specifically allege that the EPA’s approval of particular pesticide products “may affect” endangered species or their habitats for any reason other than the fact that those products contain pesticides approved in the REDs.

I agree with the majority opinion that the EPA’s approval of pesticide products is an affirmative agency action because that decision involves gathering and considering product-

specific data. However, the majority incorrectly reverses the district court's dismissal of these sub-claims by concluding that "[t]he collateral attack doctrine is simply not at issue here" because the EPA's processes for approving pesticides and then later approving pesticide products are distinct. However, these category four sub-claims were a collateral attack on the REDs based on how these sub-claims were actually pleaded in the SAC. Therefore, I would affirm the district court's dismissal.

The collateral attack doctrine prevents district courts from hearing claims that are "inescapably intertwined with a review of the procedures and merits" of an underlying agency order. *Americopters, LLC v. F.A.A.*, 441 F.3d 726, 736 (9th Cir. 2006). This doctrine prevents litigants from relitigating the merits of previous administrative procedures or evading those procedures. *Id.*

The category four sub-claims challenge the EPA's approval of *all* products that contain specific pesticides approved in the REDs based on the theory that those very pesticides "may affect" endangered species or their habitats. Had the CBD alleged anything specific why the products qua products "may affect" endangered species, then the category four sub-claims would not be a collateral attack on the REDs. But since CBD's challenge to the product approvals is based entirely on CBD's allegation that the pesticides approved in the REDs "may affect" endangered species or their habitats, the category four sub-claims are an impermissible collateral attack on the REDs.

The district court carefully analyzed whether these sub-claims as pleaded were an improper collateral attack on the REDs. *Ctr. for Biological Diversity v. EPA*, 65 F. Supp. 3d

742, 760–64 (N.D. Cal. 2014). The district court noted, “What is clear is what cannot be challenged: analyses and conclusions made in the RED. What is being challenged here is less clear.” *Id.* at 764. The district court noted that the SAC “does not identify any facts that demonstrate the product reregistrations raised any new issues regarding the EPA’s compliance with section 7 of the ESA that could not have been raised in a timely challenge to the EPA’s issuance of a RED.” *Id.* at 763. To cure this problem, the district court gave CBD leave to amend the SAC, *id.* at 764, which CBD declined to do.

Although CBD states in its Opening Brief that “[p]roduct formulations often contain more than one active ingredient that together cause synergistic harm,” *the SAC does not allege* that particular pesticide products contain specific combinations of ingredients that cause harm to listed endangered species or their habitats. There are no allegations that the approved pesticides cause harm when they interact with other specific ingredients in particular products.¹ Thus, the category four sub-claims *as pleaded* challenge the EPA’s approval of pesticide products simply because the pesticides in those products “may affect” endangered species. CBD is not entitled to a second opportunity to challenge the EPA’s approval of the pesticides just because the EPA later approves products that contain those pesticides.


¹ The SAC does state that “[t]he ecological risk assessment [for the REDs] generally does not consider the cumulative or synergistic effects posed by multiple pesticides on wildlife or the environment . . .” But this allegation is a general critique of the EPA’s process for issuing REDs, not a challenge to the unique risks posed by particular products.

The majority misses the mark by focusing on the fact that the reregistration of a pesticide product and the issuance of a RED are distinct processes. As the majority states, “[T]he EPA does not ‘rubber stamp’ the pesticide product reregistration in light of the RED.” Maj. Op. 34. Although this observation is true because a pesticide product reregistration decision involves the consideration of data not involved in the RED and is a distinct determination, “[t]he relevant inquiry is not what the statute directs, but what the plaintiff challenges.” *Grand Canyon Trust v. Bureau of Reclamation*, 691 F.3d 1009, 1021 (9th Cir. 2012)). As the EPA states in its brief, “The EPA does not dispute that a challenge to a product registration *could* raise new issues that would not be foreclosed by the collateral attack doctrine. Here, however, the Center’s failure to initiate claims do not raise any such issues.” For example, CBD does not allege that the pesticide product reregistrations raised new ESA compliance issues that could not have been raised in a challenge to the REDs. CBD’s category four sub-claims are inescapably intertwined with CBD’s challenge to the REDs because those sub-claims challenge the EPA’s approval of pesticide products on the ground that those products contain the pesticide at issue in each Claim for Relief.

The district court realized that allowing CBD to challenge every product approval simply because those products contain a particular pesticide would undermine the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). As the majority correctly concludes, when the EPA issues a RED after notice-and-comment procedures, FIFRA requires a plaintiff seeking to challenge that RED to file a petition for review in the courts of appeals. Maj. Op. 27. However, as the district court stated, “If an aggrieved party could challenge the conclusions of the RED [in a lawsuit filed in

district court] just because they were implemented in a subsequent order, as a practical matter there would be no exclusive jurisdiction in the court of appeals to consider challenges to the RED.” *Ctr. for Biological Diversity*, 65 F. Supp. 3d at 764. Since CBD’s claims challenging the product approvals *were based entirely on the conclusions of the REDs*, those claims were an improper attempt to evade FIFRA’s requirement that CBD challenge those REDs through a petition filed in the court of appeals.

The category four sub-claims fail to allege anything particular about the products approved that required the EPA to consult with the Service. Instead, the category four sub-claims attempt to relitigate the EPA’s prior approval of pesticides because the EPA later approved products that contain those pesticides. I would deny CBD’s attempt to get a second chance to challenge the pesticide approvals by affirming the district court’s dismissal of the category four sub-claims.

 KeyCite Yellow Flag - Negative Treatment
Distinguished by Center for Biological Diversity v. Environmental
Protection Agency, N.D.Cal., August 13, 2014

457 F.Supp.2d 1158

United States District Court,

W.D. Washington,

at Seattle.

WASHINGTON TOXICS COALITION; Northwest
Coalition for Alternatives to Pesticides; National
Wildlife Federation; Defenders of Wildlife; Natural
Resources Defense Council; Center for Biological
Diversity; Pacific Coast Federation of Fishermen's
Associations; Institute for Fisheries Resources; and
Helping our Peninsula's Environment, Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR;
FISH AND WILDLIFE SERVICE; United
States Department of Commerce; and National
Marine Fisheries Service; Defendants,

and

Croplife America; Washington Friends of
Farms and Forests; Washington State Potato
Commission; National Potato Council; Washington
State Farm Bureau; Idaho Farm Bureau;
Federation of Wheat Growers; Washington
Golf Course Superintendents Association; Hop
Growers of Washington; and Washington State
Horticultural Association; Defendant-Intervenors.

No. Co4-1998C.

|

Aug. 24, 2006.

Synopsis

Background: Environmental organizations brought suit challenging Fish and Wildlife Service's (FWS) and the National Marine Fisheries Service's (NMFS) counterpart regulations, which organizations alleged were an effective abdication of the Services' consultative responsibilities under Endangered Species Act (ESA) in Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) actions. Parties filed cross-motions for summary judgment.

Holdings: The District Court, Coughenour, J., held that:

[1] organizations had standing;

[2] issues presented were ripe for judicial review;

[3] other than optional formal consultation and emergency consultation provisions, counterpart regulations were not consistent with requirements of ESA; and

[4] other than optional formal consultation provisions, substantial questions about the potential impact of the counterpart regulations on the environment were sufficient to trigger the Services' obligation to prepare an environmental impact statement (EIS).

Motions granted in part and denied in part.

West Headnotes (18)

[1] Environmental Law

🚩 Organizations, associations, and other groups

Environmental organizations, whose members used the waters of Washington for recreation, fishing, and aesthetic pursuits, had standing to bring their substantive challenge under Endangered Species Act (ESA) to Fish and Wildlife Service's (FWS) and the National Marine Fisheries Service's (NMFS) counterpart regulations governing Environmental Protection Agency (EPA) actions under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); because organizations claimed that EPA's new risk assessment process contained the same defects as those observed by the Services prior to promulgation of the counterpart regulations, and because there was evidence on that EPA's former process resulted in determinations with which the Services could not concur, and because there was evidence that the former process resulted in continuing adverse effects on listed species, organizations had sufficiently alleged that the counterpart regulations would cause personal injury via adverse effects on listed species, and

organizations' requested relief, which would result in reinstating the Services' consultative role, would restore the significant protections provided by ESA consultations. U.S.C.A. Const. Art. 3, § 2, cl. 1; Endangered Species Act of 1973, § 7, 16 U.S.C.A. § 1536; 50 C.F.R. §§ 402.04, 402.40–402.48.

2 Cases that cite this headnote

[2] Environmental Law

↔ Ripeness

Issues presented by environmental organizations' challenge to Fish and Wildlife Service's (FWS) and the National Marine Fisheries Service's (NMFS) promulgation of counterpart regulations on ground that they were an effective abdication of the Services' consultative responsibilities under Endangered Species Act (ESA) in Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) actions were ripe for judicial review; counterpart regulations were sufficiently final, issues presented were "purely legal," there was no cognizable benefit to waiting for further factual development, and withholding review would exacerbate the hardship that already existed. 50 C.F.R. §§ 402.40–402.48.

Cases that cite this headnote

[3] Administrative Law and Procedure

↔ Finality; ripeness

Finality and the "purely legal" nature of the issue may not, alone, justify finding of ripeness for judicial review of a regulation where that review might inappropriately interfere with further administrative action, or where the court might benefit from further factual development of the issues presented.

Cases that cite this headnote

[4] Administrative Law and Procedure

↔ Theory and grounds of administrative decision

Administrative Law and Procedure

↔ Arbitrary, unreasonable or capricious action; illegality

An agency action will survive arbitrary and capricious review if it is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute; however, an agency action may be deemed arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 5 U.S.C.A. § 706(2).

Cases that cite this headnote

[5] Administrative Law and Procedure

↔ Permissible or reasonable construction

Under *Chevron*, when Congress has left a gap in a statute and authorized a federal agency to fill that gap, the agency's interpretation is to be accorded deference as long as it is a reasonable interpretation of the statute. 5 U.S.C.A. § 706(2).

Cases that cite this headnote

[6] Environmental Law

↔ Consultation

Endangered Species Act's (ESA) consultation requirement mandated that Environmental Protection Agency (EPA), in contemplating even actions deemed not likely to adversely affect (NLAA), to "consult" with Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to ensure that its action be not likely to jeopardize listed species. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

2 Cases that cite this headnote

[7] Environmental Law

↔ Consultation

A unilaterally-made NLAA (not likely to adversely affect determination) by Environmental Protection Agency (EPA) cannot be converted into an Endangered Species Act (ESA) finding of "not likely to jeopardize" without "consultation" with the Fish and Wildlife Service's (FWS) or the National Marine Fisheries Service (NMFS), whichever is the relevant agency. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

1 Cases that cite this headnote

[8] Environmental Law

↔ Consultation

Environmental Law

↔ Plants and wildlife;endangered species

Since the plain meaning of "consultation," as used in Endangered Species Act (ESA), did not contemplate the joint creation of a process by which action agencies could unilaterally make the critical ESA determinations regarding NLAA (not likely to adversely affect determination) actions, Fish and Wildlife Service's (FWS) and the National Marine Fisheries Service's (NMFS) counterpart regulations permitting no Service consultation on NLAA actions failed the *Chevron* step-one test and therefore were not in accordance with the law. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. §§ 402.40-402.48.

Cases that cite this headnote

[9] Environmental Law

↔ Consultation

Because Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) remained free to amend or altogether reject Environmental Protection Agency's (EPA) effects determination in favor of a Service-authored biological opinion, thereby preserving and retaining their consultative role, optional formal consultation procedure contained in Services' counterpart regulations for Federal Insecticide, Fungicide, and

Rodenticide Act (FIFRA) cases did not violate Endangered Species Act's (ESA) consultation requirement. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.46.

1 Cases that cite this headnote

[10] Environmental Law

↔ Consultation

Fish and Wildlife Service's (FWS) and the National Marine Fisheries Service's (NMFS) counterpart regulations permitting Environmental Protection Agency (EPA) to "choose" to employ the emergency consultation procedures on Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) section 18 actions did not violate Endangered Species Act's (ESA) consultation requirement; emergency consultation provisions were merely optional, and temporal shifting of consultations that resulted from taking advantage of them was not inconsistent with ESA. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.05.

1 Cases that cite this headnote

[11] Environmental Law

↔ Consultation

Fish and Wildlife Service's (FWS) and the National Marine Fisheries Service's (NMFS) promulgation of counterpart regulations for Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) cases was an agency action subject to Endangered Species Act (ESA) consultation requirement. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

1 Cases that cite this headnote

[12] Environmental Law

↔ Consultation

An action is an "agency action" subject to Endangered Species Act (ESA) consultation requirement if there is discretionary

federal involvement or control; discretionary involvement or control is found where an agency retains the ability to influence or change a given project. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

Cases that cite this headnote

[13] Environmental Law

↔ Consultation

Fish and Wildlife Service and (FWS) and the National Marine Fisheries Service (NMFS), in promulgating counterpart regulations under Endangered Species Act (ESA) for Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) actions which permitted Environmental Protection Agency (EPA) to make unilateral NLAA (not likely to adversely affect) determinations and to permit those NLAA determinations to be equivalent to a finding of "not likely to jeopardize," failed to comply with their ESA mandate to "insure" that their actions were "not likely to jeopardize" listed species; Services acted arbitrarily and capriciously in deciding to promulgate the counterpart regulations in their current state, knowing of the substantial flaws in EPA's methodologies and knowing that those flaws were highly likely (if not certain) to result in an overall under-protection of listed species as compared to the general consultation regulations. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

Cases that cite this headnote

[14] Environmental Law

↔ Consultation

Fish and Wildlife Service and (FWS) and the National Marine Fisheries Service (NMFS), in promulgating counterpart regulations under Endangered Species Act (ESA) for Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) actions, acted arbitrarily and capriciously in permitting Environmental Protection Agency (EPA) to

use emergency consultation procedures for the whole range of FIFRA section 18 actions; FIFRA's definition of "emergency," and ESA's definition of "emergency," while overlapping, were not equivalent to one another. 50 C.F.R. § 402.05.

1 Cases that cite this headnote

[15] Environmental Law

↔ Duty of government bodies to consider environment in general

Environmental Law

↔ Time requirements

Comprehensive "hard look" required by National Environmental Policy Act (NEPA) must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. § 1501.2.

Cases that cite this headnote

[16] Environmental Law

↔ Time requirements

Although timing of federal agencies' National Environmental Policy Act (NEPA) compliance strongly implied that it was an afterthought, rather than a bona fide attempt to gather information and to analyze the environmental consequences of their actions in promulgating counterpart regulations under Endangered Species Act (ESA) for Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) actions, the absence of any evidence of sincere interest or alacrity were not sufficient for a finding that the agencies' manner violated NEPA. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 40 C.F.R. § 1501.2; 50 C.F.R. §§ 402.40-402.48.

1 Cases that cite this headnote

[17] Environmental Law

⇒ Waste;hazardous materials

Fish and Wildlife Service and (FWS) and the National Marine Fisheries Service (NMFS) violated National Environmental Policy Act (NEPA) by failing to prepare an environmental impact statement (EIS) considering all of the impacts of, and alternatives to, adoption of NLAA (not likely to adversely affect) and emergency consultation provisions of counterpart regulations under Endangered Species Act (ESA) for Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) actions; the virtual unanimity of the Service biologists' and toxicologists' criticisms of Environmental Protection Agency (EPA) and their litany of comments regarding the insufficiency of EPA's methods to protect listed species raised substantial questions about the potential impact of the counterpart regulations on the environment sufficient to trigger the Services' obligation to prepare an EIS. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 50 C.F.R. §§ 402.40–402.48.

1 Cases that cite this headnote

[18] **Environmental Law**

⇒ Waste;hazardous materials

Optional formal consultation provisions contained in Fish and Wildlife Service's and (FWS) and the National Marine Fisheries Service's (NMFS) counterpart regulations under Endangered Species Act (ESA) for Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) cases would not have a significant impact on either

the relationship between Environmental Protection Agency (EPA) and the Services or on the quality of the human environment, and therefore no environmental impact statement (EIS) was required; under such provisions, Services remained free to amend or altogether reject EPA's effects determination in favor of a Service-authored biological opinion, thereby preserving and retaining their consultative role. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 50 C.F.R. § 402.46.

Cases that cite this headnote

West Codenotes

Held Invalid

50 C.F.R. §§ 402.40, 402.41, 402.42, 402.43, 402.44, 402.47, 402.48; 50 C.F.R. § 402.05

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ORDER

COUGHENOUR, District Judge.

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***1163 I. INTRODUCTION**

This matter has come before the Court on the parties' cross-motions for summary judgment. Having carefully considered the papers filed by the parties and the entire record now before the Court, the Court has determined that no oral argument shall be necessary. For the following reasons, the Court hereby GRANTS in part and DENIES in part Plaintiffs' motion, GRANTS in part and DENIES in part the Federal Defendants' motion, and GRANTS in part and DENIES in part the Defendant–Intervenors' motions.

II. BACKGROUND

Plaintiffs, a group of organizations who have an interest in preserving and conserving the environment, brought this suit to challenge certain actions taken by the Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively “the Services”), alleging that the actions violate section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536, and that they were taken without adherence to the procedural requirements of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332.

A. Statutory and regulatory context of ESA section 7 consultations

The Endangered Species Act provides certain protections to species listed under ESA section 4 as “endangered” or “threatened” (collectively “listed species”). Section 7(a)(2) of the ESA states:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.... In

fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536(a)(2) (parenthetical omitted). The “Secretary” referred to in the statute, in the case of the Secretary of Commerce (for some marine species), has delegated his ESA role to NMFS, and in the case of the Secretary of the Interior (for the remaining listed species), has delegated her ESA role to FWS.

In 1986, the Services jointly issued regulations further shaping the section 7 consultation process. 51 Fed.Reg. 19,926 (1986). These regulations created three categories of federal agency action possibly requiring consultation: actions likely to adversely affect (“LAA”), actions not likely to adversely affect (“NLAA”) and actions that will have no effect on listed species or critical habitat. LAA actions require formal consultation, while NLAA actions may fulfill the statutory and regulatory requirements with a streamlined informal consultation. No consultation is required for actions that have no effect on listed species.

The regulations provided that “[t]he consultation procedures set forth in this Part may be superseded for a particular Federal agency by joint counterpart regulations among that agency”, [FWS], and the [NMFS]. 50 C.F.R. § 402.04 (effective June 3, 1986). The regulations require, however, that “[s]uch counterpart regulations must retain the overall degree of protection afforded listed species required by the Act and these regulations.” 50 C.F.R. § 402.04; 51 Fed.Reg. at 19,937.

B. Promulgation of the counterpart regulations regarding FIFRA actions

In 2004, pursuant to this authority to devise different consultation procedures, ***1164** the Services promulgated new counterpart regulations for Environmental Protection Agency (“EPA”) actions under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”). Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 69 Fed.Reg. 47,732 (Aug. 5, 2004) (codified at 50 C.F.R. §§ 402.40–48).

"FIFRA is the primary statute under which EPA regulates the use of pesticides in the United States." 69 Fed.Reg. at 47,733 (citing 7 U.S.C. § 136 *et seq.*). In general, a pesticide may not be sold or distributed unless it has a license, or "registration," from EPA. FIFRA section 12(a)(1). EPA "shall register a pesticide if" among other things, "when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(5). Recognizing that environmental standards and data evolve, FIFRA built in a periodic re-registration process, with the goal of achieving a review of each pesticide registration every fifteen years. 7 U.S.C. § 136a(g)(1). Although this re-registration process had been on the books since 1972, "as of 1986, EPA had re-registered none of the tens of thousands of pesticides subject to re-registration, and had completed its reassessment of none of the 600 pre-1972 pesticide active ingredients." (Compl. ¶ 34 (citing GEN. ACCOUNTING OFFICE, EPA'S FORMIDABLE TASK TO ASSESS AND REGULATE THEIR RISKS 3 (1986)).)

C. Effect of counterpart regulations

The parties do not dispute that EPA is faced with a task of gargantuan proportions, nor do they dispute that the counterpart regulations challenged by Plaintiffs are an attempt to streamline and accelerate the process of registration and re-registration. *See, e.g.*, 69 C.F.R. at 47,732 (explaining that "[t]hrough this final joint rulemaking, the FWS and NOAA adopt additional regulations to enhance the efficiency and effectiveness of the consultation process under section 7 of the ESA and to provide alternatives to the way EPA now consults with the Services under the ESA on regulatory actions under FIFRA involving pesticides").

Prior to adoption of the counterpart regulations, an NLAA determination could only be made by an agency with the written concurrence of the Director of the appropriate Service, and after preparation of a biological assessment by the appropriate Service or informal consultation with that Service. 50 C.F.R. § 402.14. The counterpart regulations now permit EPA to make NLAA determinations without informal consultation or the Services' concurrence if EPA and the Services have entered into an "alternative consultation agreement" ("ACA") meeting certain requirements, *see* 50 C.F.R. § 402.45.

In the context of actions requiring formal consultation, the potential streamlining effect of the counterpart regulations is even greater. Where initiation of a written request for consultation used to trigger a whole host of Service responsibilities culminating in the production of a comprehensive biological opinion and discussion of that opinion with the requesting agency and any applicant, *see* 50 C.F.R. § 402.14(g),¹ under the counterpart regulations, *1165 the Services' obligations are now limited to (a) adopting in full EPA's effects determination, (b) adopting EPA's effects determination as modified by the Services, with a detailed explanation of the scientific and commercial data and rationale supporting any modification, or (c) providing EPA with "a draft of a biological finding that the proposed FIFRA action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, and describing any reasonable and prudent alternatives if available," 50 C.F.R. § 402.46(c). Further streamlining the process is the fact that under the counterpart regulations, Service discussion with EPA or the applicant(s) of the biological opinion—should a Service choose option (b) or (c) (*i.e.*, non-wholesale adoption of EPA's effects determination)—is at EPA's *1166 option, rather than a mandatory part of the process. *See* 50 C.F.R. § 402.46(c)(3) (providing that "[t]he Service shall at the request of EPA or an applicant discuss with EPA and the applicant the Service's review and evaluation under this section"), *compare* 50 C.F.R. § 402.14(g)(5) (not couched in optional language).

Finally, the counterpart regulations expand the permissible use of the truncated "emergency" consultation procedures under 50 C.F.R. § 402.05 to cover all FIFRA section 18 actions,² effectively equating FIFRA emergencies with ESA emergencies.

D. Plaintiffs' complaint

Plaintiffs' complaint asserts seven causes of action, as follows:

- (1) FWS and NMFS exceeded their authority, acted *ultra vires*, and acted arbitrarily, capriciously, and contrary to ESA section 7 by delegating their ESA consultations to EPA in the counterpart regulations and the alternative consultation agreement;
- (2) FWS and NMFS acted arbitrarily, capriciously, and contrary to the ESA by promulgating counterpart

regulations and entering into the ACA, which fail to ensure that EPA pesticide registrations are not likely to jeopardize listed species or destroy or adversely modify their critical habitat;

- (3) FWS and NMFS acted arbitrarily, capriciously, and contrary to section 7(a)(2) by failing to reconcile the counterpart regulations and the ACA with the best available scientific information and by failing to ensure that EPA self-consultations will use the best available science;
- (4) The Services acted arbitrarily, capriciously, and contrary to ESA section 7(a)(2) in issuing counterpart regulations and entering into an ACA that authorize EPA to make “not likely to adversely affect” determinations without considering the environmental baseline or cumulative effects;
- (5) FWS and NMFS acted arbitrarily, capriciously, and contrary to the ESA and the joint consultation regulations by establishing an optional formal consultation process based on a rationale that runs counter to the record and the best science;
- (6) EPA acted arbitrarily, capriciously, and contrary to the ESA and the joint consultation regulations in making all FIFRA section 18 exemptions, even those based solely on economic losses, subject to truncated consultation procedures established for human health emergencies;
- (7) FWS and NMFS acted arbitrarily, capriciously, and contrary to NEPA and its implementing regulations by failing to prepare an environmental impact statement assessing alternatives to and the full impacts of the counterpart regulations and the ACA.

(*Compl.passim.*) Thus, Plaintiffs' complaint asserts both procedural and substantive challenges to the counterpart regulations.

Plaintiffs, the Services, and Defendant–Intervenors have all filed cross-motions for summary judgment.

III. ANALYSIS

A. Summary judgment standard

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment motions, and provides in relevant

part, that “[t]he judgment sought shall be *1167 rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” FED.R.CIV.P. 56(c). In determining whether an issue of fact exists, the court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable fact-finder to find for the non-moving party. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. The moving party bears the burden of showing that there is no evidence which supports an element essential to the non-movant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In order to defeat a motion for summary judgment, the non-moving party must make more than conclusory allegations, speculations or argumentative assertions that material facts are in dispute. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir.1994).

B. Jurisdictional challenges to Plaintiffs' complaint

The Services and Defendant–Intervenors argue that the Court lacks jurisdiction to hear Plaintiffs' claims because Plaintiffs do not have standing to bring this lawsuit and because Plaintiffs' substantive challenges to the counterpart regulations are not yet ripe for consideration.³ It is Plaintiffs' burden, at this stage of the litigation, to establish that there is no genuine issue of material fact remaining for trial regarding their standing and the ripeness of their claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (explaining that standing is not a “mere pleading requirement but rather an indispensable part of the plaintiff's case” and that “each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation”).

1. Standing

To have standing, a plaintiff

must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Citizens for Better Forestry v. USDA, 341 F.3d 961, 969 (9th Cir.2003) (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). By "particularized," the Supreme Court "mean[t] that the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 561 n. 1, 112 S.Ct. 2130. Put more simply, a plaintiff must "allege (1) personal injury (2) fairly traceable to the defendant's allegedly unlawful conduct and (3) [that is] likely to be redressed by the requested relief." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 956 (9th Cir.2005).⁴

***1168 [1]** As Plaintiffs are organizations, Plaintiffs' members must meet the standing test. *See, e.g., id.* at 956. Here, Plaintiffs' members "use the waters of Washington for recreation, fishing, and aesthetic pursuits" (Compl.¶ 2), "engage in and obtain great enjoyment and benefit from observing, studying, and photographing wildlife, including threatened and endangered species" (Compl.¶ 4), and "depend on fish as a natural resource and, until recent fisheries closures ... generated hundreds of millions of dollars in personal income to the [Pacific] region through commercial fishing" (Compl.¶ 8), among other things. These allegations regarding Plaintiffs' enjoyment of and interest in listed species "meet the criteria for demonstrating an adequate injury in an environmental case" *Defenders of Wildlife*, 420 F.3d at 957.

The Court begins by noting that with respect to the second and third prongs of the standing issue, the case at bar is virtually on all fours with *Defenders of Wildlife v. EPA*. The *Defenders of Wildlife* plaintiffs had alleged violations of ESA section 7(a)(2)'s substantive and procedural requirements. *Id.* at 957. In that case, the Ninth Circuit accepted the plaintiffs' contention that ESA "section 7 consultation ha[d] in the past led to mitigation measures by real estate developers ... and ha[d] thereby

protected listed species and their habitat." *Id.* at 956. In particular, the court noted that during consultation regarding the challenged decision transferring pollution permitting authority from the federal agency to a state agency, FWS field staff had registered "serious reservations about the proposed transfer" because "section 7 consultations regarding past pollution permits in Arizona had led to mitigating measures to protect species' critical habitat, and feared that, without such mandatory consultation, Arizona would issue permits without mitigating measures" and that "[a]s a result, there could be harm to certain listed species." *Id.* at 952. Accordingly, the court found that "[t]he alleged injuries are fairly traceable to the EPA's ... decision. As alleged by [Plaintiffs], that decision will remove water pollution permitting decisions from the significant protections provided by section 7 [consultations]." *Id.* at 958.

In the case at bar, according to Plaintiffs' allegations, the counterpart regulations would remove the Services from NLAA/"not likely to jeopardize" determinations, resulting in the removal of "the significant protections provided by section 7." The counterpart regulations would diminish or delay section 7 "protections" in the case of "optional formal consultations" and FIFRA section 18 emergency pesticide registrations. *Lujan* requires that these allegations regarding causation and redressability be supported by "facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury." 504 U.S. at 562, 112 S.Ct. 2130. For the following reasons, the Court finds that Plaintiffs have adduced sufficient facts to satisfy their burden of proof as to their standing.

This Court has previously had occasion to address a lawsuit filed by the Washington Toxics Coalition, the Northwest Coalition for Alternatives to Pesticides, the Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources against EPA, seeking to compel EPA to conduct section 7 consultations regarding certain pesticides and their effects on listed salmon and steelhead. *Wash. Toxics Coalition v. EPA*, No. C01-0132C (W.D. Wash. filed Jan. 30, 2001). In that action, after having reviewed the record, the Court found that EPA's failure to initiate section 7(a)(2) consultations with NMFS with respect to 55 pesticides for which EPA's own reports showed potentially significant risks to listed salmonids and their habitat, yet ***1169** which had ongoing approval and or registration, violated ESA

section 7(a)(2). *Wash. Toxics Coalition v. EPA*, No. C01-0132C, Order (W.D.Wash. July 2, 2002). Perhaps more pertinent is the fact, noted by the Ninth Circuit in its opinion affirming this Court's orders, that EPA did not dispute that "scientific or competent declaratory evidence in the record demonstrated a causal link between the 54 pesticide active ingredients at issue ... and direct or indirect adverse effects on salmonid populations." *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1029 (9th Cir.2005). Accordingly, the Court finds that the record shows that EPA's continued registration of at least 54 pesticides without having satisfied its consultation obligations under the general consultation regulations has a causal link to direct or indirect adverse effects on listed species.

Second, the administrative record is threaded through with consistent criticisms by Service personnel of EPA's proposed assessment process. Most remarkable is that the tenor of these criticisms did not change throughout the entire time during which the Services and EPA supposedly were working together to come up with an ESA-compliant effects determination process. The substance of these critiques is discussed more fully in Section III(E), *infra*, addressing the merits of Plaintiffs' claims.

Perhaps more pertinent for the purposes of the standing analysis, many of the concerns that arose during the programmatic discussions had been voiced before by Service scientists in the context of specific pesticide registrations or interim registrations. (See, e.g., FWS 000720, FWS Letter to EPA re: Diazinon at 4 (July 20, 2000) (noting that sublethal effects of diazinon were a major concern); FWS 020627, FWS Letter to EPA re: Atrazine at 3 (June 27, 2002) (stating "EPA's pesticide risk assessments do not address several other important data gaps, including" (1) sublethal effects; (2) use of surrogate species; and (3) "inert" ingredients and adjuvants); FWS 020726, FWS Letter to EPA re: Endosulfan at 4-6 (July 26, 2002) (raising the issue of EPA's failure to adequately consider sublethal effects, disapproving EPA's weak label requirements and warning EPA that its acceptance of manufacturer-submitted studies in support of reregistration—78% of which did not conform to EPA's own guidelines—"suggests that EPA may be unable to make a science-based decision" and that "the failure of EPA to require manufacturers to adhere to EPA requests 20 years [after EPA identified some of the same data gaps in a previous risk assessment] raises serious questions

about data adequacy and the usefulness of EPA's overall assessment").)

By June 2004, the Services' concerns had neither changed nor abated. A draft NLAA nonconcurrence letter circulated by NMFS personnel, in which the Northwest Region Washington State Office ("WSO") of NMFS reviewed the draft biological evaluations and requests for concurrence with EPA's "may affect, not likely to adversely affect" determinations with regard to 28 pesticide registrations, noted almost identical categorical concerns with EPA's assessments.⁵ (NMFS 5185, Draft Ltr. re: *1170 NLAA Nonconcurrence (June 7, 2004).) More pertinent is the fact that

NOAA Fisheries does not concur with EPA's effects determinations. NOAA Fisheries believes the proposed actions, which includes [*sic*] registrations/reregistrations of active ingredients, formulated products ... and mixtures ..., will have greater than discountable or insignificant effects on listed species. NOAA Fisheries has determined that the proposed actions are "likely to adversely affect" the 26 ESUs and thus, require formal consultation.

(*Id.*) The Court is particularly impressed by the fact that of EPA's 28 requests for concurrence, the WSO concurred with *none* of EPA's NLAA determinations. This letter is direct evidence of a link, if such evidence were necessary, between the Services' criticisms of EPA's risk assessment process and the disparity between the results yielded by a typical EPA assessment and a Service study.

Despite the Services' consistent systematic criticism of EPA's risk assessment process, the final procedure agreed to by the Services did not address these long-observed problems. Because Plaintiffs contend that EPA's new risk assessment process contains the same defects as those observed by the Services prior to promulgation of the counterpart regulations, and because there is evidence on the record that EPA's former process resulted in determinations with which the Services could not concur, and because there is evidence that this former process has resulted in continuing adverse effects on listed species, the Court finds that under *Defenders of Wildlife v. EPA*, Plaintiffs have sufficiently alleged that the counterpart regulations will cause personal injury via adverse effects on listed species. In the words of the *Defenders of Wildlife* Court, "the alleged injuries are fairly traceable to the

[counterpart regulations.] As alleged by [Plaintiffs], [the regulations] will remove [NLAA pesticide registrations] from the significant protections provided by section 7 [consultations],” 420 F.3d at 957, and diminish or delay section 7 protections in the case of optional formal consultations and FIFRA section 18 registrations.

Finally, as in *Defenders of Wildlife*, Plaintiffs' requested relief, which would result in reinstating the Services' consultative role, would restore the “significant protections provided by section 7 [consultations].” *Id.* at 957. Accordingly, the Court finds that Plaintiffs have sustained their burden of showing that they have standing to bring their substantive challenge to the counterpart regulations.

2. Ripeness

[T]he ripeness requirement is designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732–33, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). The ripeness analysis is comprised of two prongs: (1) “fitness of the issues for judicial decision,” *id.* at 733, 118 S.Ct. 1665 (citations omitted); and (2) “hardship to the parties of withholding court consideration,” *id.*

*1171 In determining whether the issues are fit for judicial decision, a court looks to whether the controversy presented is “definite and concrete,” as opposed to “hypothetical or abstract.” *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of Mont.*, 792 F.2d 782, 788 (9th Cir.1986) (citing *Babbitt v. United Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). The *Assiniboine* Court further clarified that “[r]eview is not premature if the agency action is final, and is ‘purely legal.’ ” *Id.* at 798 (citing *Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. 1507). In that case, involving one entity's abdication of its role in fact-finding and drawing initial conclusions, the court found that even if no actions had been taken as a result of or subsequent to the abdication of responsibility, the district court would have still been in

a position to decide the merits of the plaintiffs' challenge to the abdication. *Id.* Fitness may be lacking, however, if “judicial intervention would inappropriately interfere with further administrative action” or if the reviewing court “would benefit from further factual development of the issues presented.” *Ohio Forestry*, 523 U.S. at 733, 118 S.Ct. 1665.

[2] The relevant facts of this case are roughly analogous to the facts of *Assiniboine*. Here, Plaintiffs have challenged the Services' promulgation of counterpart regulations, which Plaintiffs allege are an effective abdication of the Services' consultative responsibilities in FIFRA actions.

This case is not like *Ohio Forestry*, on which the Services rely, and in which the plaintiffs challenged the Forest Service on its promulgation of a management plan which would permit logging activity to increase but which did not itself actually authorize the cutting of any trees. 523 U.S. at 729, 118 S.Ct. 1665. In that case, the Supreme Court found that the Sierra Club's challenge was non-justiciable because it did “not find a strong reason why the Sierra Club must bring its challenge now.” *Id.* at 734, 118 S.Ct. 1665. The Supreme Court reasoned that before actual logging would be allowed, the Forest Service still had a number of procedural steps to complete, one of which required it to “permit the public [including the Sierra Club] an opportunity to be heard.” *Id.* Most importantly,

[t]he Sierra Club thus will have ample opportunity later to bring its legal challenge.... Any such challenge might also include a challenge to the lawfulness of the present Plan if (but only if) the present Plan then matters, *i.e.*, if the Plan plays a causal role with respect to the future, then-imminent harm from logging.

Id.

If this case were to be analogous to *Ohio Forestry*, Plaintiffs would have had to sue EPA. However, Plaintiffs have very specifically asserted claims only against the Services. Thus, unlike the Sierra Club in *Ohio Forestry*, if Plaintiffs do not or are not allowed to challenge the Services at this stage, Plaintiffs may not have another chance to challenge the Services for having

promulgated the counterpart regulations. For example, because the counterpart regulations permit EPA to make NLAA determinations without informal consultation of or written concurrence from the Services,⁶ should Plaintiffs wish to challenge an NLAA determination in the future, they may only assert this claim against EPA because the Services will have had no role in making this determination. In this respect, Plaintiffs are correct when they *1172 argue that the thrust of the Services' motion with respect to ripeness "describe[s] a different cause of action against a different defendant." (Pls.' Reply 5.) Here, Plaintiffs' lawsuit challenges the Services' abdication of their consultative role in FIFRA actions, not EPA's role in adopting the counterpart regulations or EPA's decision regarding any particular registration.

The record shows that the counterpart regulations, labeled "Final Rule" are, indeed, final. The removal of the Services from the consultation process was triggered by adoption of the ACA on August 25, 2004. Even if the Services or EPA were to determine that the ACA should be terminated, thereby restoring the Services' role in some fashion, NLAA determinations made while the ACA had been in effect would continue to be considered valid. 50 C.F.R. § 402.45(c). Therefore, the Court finds that the counterpart regulations are sufficiently final to support a finding of ripeness.

[3] No party disputes that the issues presented are "purely legal" for the purposes of the ripeness analysis. However, the Services correctly point out that finality and the "purely legal" nature of the issue may not, alone, justify judicial review of a regulation where that review might inappropriately interfere with further administrative action, or where the Court might benefit from further factual development of the issues presented. With respect to the latter concern, the Services point to *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967), in which the Supreme Court, acknowledging that "there can be no question that this regulation ... is a 'final agency action' ... [and] that the issue as [the plaintiffs] have framed it presents a purely legal question" nevertheless found that "judicial appraisal ... is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here." 387 U.S. at 164-65, 87 S.Ct. 1520.

This case is unlike *Toilet Goods Association* (and *Ohio Forestry*) in that the regulation being challenged here does not set the stage for a specific kind of action to follow. In *Toilet Goods Association* and *Ohio Forestry*, the plaintiffs challenged the promulgation of a regulation that paved the way for a specific type of action, permitting inspection of facilities and data, and permitting logging of more land, respectively. The Sierra Club in *Ohio Forestry* challenged the land management plan as "wrongly favor[ing] logging and clearcutting." 523 U.S. at 731, 118 S.Ct. 1665. The plaintiffs in *Toilet Goods Association* challenged a regulation giving the FDA Commissioner free access to the plaintiffs' facilities. In each case, the court found that a sample application of the regulation (*i.e.*, further factual development) would provide helpful data. The *Toilet Goods Association* Court explained:

The regulation serves notice only that the Commissioner may under certain circumstances order inspection of certain facilities and data, and that further certification of additives may be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order.

387 U.S. at 163, 87 S.Ct. 1520. The Court added that the necessary inquiry would have to look into "what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets." *Id.*

*1173 In contrast, the regulation here *is* the action being challenged. The regulation itself effects a significant change in the Services' involvement in FIFRA actions, and it is *this* change that is protested by Plaintiffs, not its effect on future pesticide registrations or re-registrations (although it could be fairly said that Plaintiffs protest the change *because* of its expected future effects).⁷ As a result, the Court does not perceive, nor do the Services or Defendant-Intervenors identify, any cognizable benefit to waiting for further factual development.⁸ Further

factual development would shed no additional light on whether the Services' alleged abdication of their section 7 consultative role was legally proper because the inquiry in this case is whether the Services acted arbitrarily and capriciously when, *on the basis of the record already before them*, they made the decision to promulgate the counterpart regulations. Therefore, the Court does not find that the potential benefit of additional factual development justifies delaying review of this final action.⁹

In addition, the Court does not find that judicial review at this point will inappropriately interfere with further administrative action. The *Ohio Forestry* Court, which suggested that courts consider this factor, reasonably suspected that premature review of the forest plan would deny the agency the opportunity to correct its mistakes and to apply its expertise in so doing because of history indicating that further consideration would actually occur before the Plan was implemented. 523 U.S. at 735, 118 S.Ct. 1665. In contrast, in the present case, the Court is not aware of any such history relevant to the kind of regulation in question. Furthermore, the specific effect of the counterpart regulations, removing a potential dissenting voice from EPA effects determinations, makes it *less* likely rather than *more* likely that future developments will inspire the Services to *1174 reconsider and “correct” the counterpart regulations, if necessary. The practical effect of the regulations, which removes the Services from part of the FIFRA loop, is to make it difficult for the Services to remain apprised of and involve themselves in policing EPA FIFRA determinations—a likely necessary element of an effort to re-calibrate the counterpart regulations. For these reasons, the Court does not find that judicial review of the counterpart regulations will inappropriately interfere with further administrative action.

Accordingly, the Court finds that the issues presented are fit for judicial review.

The second prong of the ripeness analysis considers hardship to the parties of withholding court consideration. The Ninth Circuit has recognized that *Ohio Forestry* “answers [the hardship question] differently depending on whether a substantive or procedural challenge is made.” *Citizens for Better Forestry v. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir.2003). In the case of a substantive challenge to a substantive rule or regulation, such as in *Ohio Forestry*, no hardship occurs until a site-

specific implementation. 523 U.S. at 733–34, 118 S.Ct. 1665. In the case of a procedural challenge (*e.g.*, a claim that the NEPA procedure was not adequately followed), whether it be to a substantive or a procedural rule or regulation, the injury occurs at the time of the alleged procedural failure. *Id.* at 737, 118 S.Ct. 1665 (explaining, for example, that “a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get ripper”).

Generally speaking, Plaintiffs assert that their challenge to the counterpart regulations is a procedural challenge and therefore that hardship is irrelevant (or, in the alternative, has already occurred). In contrast, the Services and the Defendant–Intervenors argue that Plaintiffs' challenge is to the substance of the counterpart regulations. Although Plaintiffs do assert a procedural claim, the bulk of their claims challenge the substance of the counterpart regulations as non-ESA-compliant. However, because the counterpart regulations are themselves a procedural measure, rather than a substantive one like the forest plan challenged in *Ohio Forestry*, Plaintiffs' claim as to the substance (that is, as to the merits) is, ultimately, that the counterpart regulations work a procedural harm.¹⁰ In other words, Plaintiffs' complaint effectively alleges two types of procedural harm at two different levels: (1) the Services, in promulgating the counterpart regulations, failed to follow NEPA procedures; and (2) the counterpart regulations themselves effect a procedural harm.

Thus, under *Ohio Forestry* and the Ninth Circuit's interpretation of that case in *Citizens for Better Forestry*, the injury to Plaintiffs, because it is a procedural one, has already occurred by the very promulgation of the counterpart regulations. Accordingly, *1175 the Court finds that withholding review would exacerbate the hardship that already exists and that this matter is ripe for review.

C. Standard of review for agency action

[4] The Court's review of the Services' promulgation of the counterpart regulations is governed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2). Under the APA, the Court may “hold unlawful and set aside” agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). “An agency action will survive

arbitrary and capricious review if it is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute.” *Defenders of Wildlife*, 420 F.3d at 959 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotes omitted)). However, an agency action may be deemed arbitrary and capricious if

the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. Most relevant to the present case is that “[a]gency actions may not, of course, be inconsistent with the governing statute.” *Id.* (citing 5 U.S.C. § 706(2)(A) instructing courts to “set aside” agency action “not in accordance with law”).

D. Standard of review for facial challenges to regulations

[5] The parties disagree as to whether the counterpart regulations are reviewable under the standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) or the more stringent “no set of circumstances” standard articulated in *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). As explained by the Ninth Circuit, “*Chevron* ... established the rule that when Congress has left a gap in a statute and authorized a federal agency to fill that gap, the agency’s interpretation is to be accorded deference as long as it is a ‘reasonable’ interpretation of the statute.” *Van Tran v. Lindsey*, 212 F.3d 1143, 1151 (9th Cir.2000). Thus, *Chevron* establishes a two-part analysis under which a court determining whether an agency regulation is inconsistent with its governing statute must (1) “ask whether Congress has directly spoken to the precise question at issue” and if so, whether the regulation comports with the clear meaning of the statute; and (2) if “the statute is silent or ambiguous with respect to the specific issue, [it] must ask whether the regulations promulgated by the agency are based

on a permissible construction of the statute.” *Akhtar v. Burzynski*, 384 F.3d 1193, 1198 (9th Cir.2004).

In contrast, under *Salerno*, it appears that a court may invalidate a regulation only if no set of circumstances exists under which the regulation would be valid. 481 U.S. at 745, 107 S.Ct. 2095 (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”); *Reno v. Flores*, 507 U.S. 292, 301, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (applying *Salerno* to challenges of regulations: “[T]o prevail in such a facial challenge, [the challenger] must establish that no set of circumstances exists under which the regulation would be valid.”) (citing *1176 *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095) (alterations and quotes omitted).

Although the parties vigorously dispute the issue of which standard of review applies, none of the parties follow through on the notion that the two standards are not mutually exclusive.¹¹ In any case, the Court need not determine whether *Chevron* is trumped by *Salerno* because the contours of this particular challenge do not require it. Plaintiffs’ claims are (1) that the very terms of the counterpart regulations themselves violate ESA section 7’s command to federal agencies to consult with the Services; and (2) that the Services themselves, in promulgating the regulations, violated ESA section 7 by failing to ensure that the regulations were “not likely to jeopardize” listed species. If Plaintiffs are correct, then every application of the counterpart regulations necessarily violates the statute. Whether and how the regulations are applied are immaterial. In other words, if Plaintiffs’ claims have merit, the arguably stricter *Salerno* standard is met and there would be no set of circumstances under which the counterpart regulations could be valid because their very terms violate the relevant statute.¹²

E. Merits

Plaintiffs seek to set aside the counterpart regulations under the APA as contrary to ESA section 7(a)(2) and to obtain a declaratory judgment that the Federal Defendants violated NEPA.

1. ESA challenges

Plaintiffs' ESA-based challenges focus on both (1) the counterpart regulations' substantive compliance with ESA section 7(a)(2) (*i.e.*, do the processes outlined in the counterpart regulations satisfy ESA section 7(a)(2)?), and (2) the Services' compliance with the requirements of ESA section 7(a)(2) in promulgating the regulations (*i.e.*, did the Services "insure" that the counterpart regulations would be not likely to jeopardize?). The substantive challenges address NLAA determinations, optional formal consultation on LAA actions, and FIFRA section 18 registrations.

a. Regulations' substantive compliance with ESA section 7(a)(2)

i. NLAA determinations

Plaintiffs' first substantive challenge to the counterpart regulations is that ESA section 7(a)(2) prohibits the Services' delegation to EPA of their role in an NLAA determination.

In determining what Congress has enacted, the Court must begin with the language of the statute. *Akhtar*, 384 F.3d at 1198 (citing *Navajo Nation v. Dep't of Health & Human Servs.*, 325 F.3d 1133, 1136 (9th Cir.2003)). The presumption is that "the ordinary meaning of the words chosen by Congress accurately express its legislative intent." *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir.2001). "The meaning of statutory language, plain or not, depends on context." *Id.* "Context" includes "the design of the statute as a whole and ... its object and policy." *Id.* *1177 "In determining a statutory provision's meaning, [the Court] may consider the purpose of the statute in its entirety, and whether the proposed interpretation would frustrate or advance that purpose." *Id.* (citing *United States v. Mohrbacher*, 182 F.3d 1041, 1049 (9th Cir.1999)) (quotations omitted).

[6] The relevant language of ESA section 7 states: "Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of" any listed species. As a point of departure, there is no dispute that this language requires an action agency to insure that any action authorized is not likely to jeopardize the continued existence of listed species.¹³ CropLife characterizes the critical question as whether this language "flatly prohibits

the delegation of NLAA authority to EPA." (CropLife's Reply 3.)

CropLife's elegantly simple statement of the question rather misses the point.¹⁴ As the Services point out in their brief, "[i]ndeed, the 'not likely to adversely affect' standard is not even found in the ESA." While the Services make this point in an effort to show that section 7(a)(2) does not require consultation with and the assistance of the Services to reach an NLAA determination (because NLAA language is not to be found anywhere in the statute), what the point actually shows is that a finding of NLAA is not statutorily equal to a finding that an action is "not likely to jeopardize." In other words, an NLAA determination, standing alone, is not equivalent to a section 7(a)(2) determination made by an action agency "in consultation with and with the assistance of the Secretary" that an action is "not likely to jeopardize."

Because the NLAA concept is irrelevant to the actual statute, Defendants are correct insofar as they argue that the statute permits the Services to delegate their authority to participate in NLAA determinations. However, to the extent that Defendants' argument is also an argument that the Services may abdicate their consultative role in formulating the conclusion that an action is "not likely to jeopardize," this argument requires further discussion.

Mandatory nature of "consultation"

The Services concede that section 7 contains a "requirement to act 'in consultation with and with the assistance of the Secretary' " (Fed. Defs.' Opp'n 25), but they and CropLife contend that the section's mandatory "shall" applies only to the substantive obligation to ensure that an action is not likely to jeopardize listed species (Fed Defs.' Opp'n 26; CropLife's Mot. 25–30).

This latter argument has been flatly rejected by the Ninth Circuit. In *Defenders of Wildlife*, the court stated that

Section 7(a)(2) makes no legal distinction between the trigger for its *requirement* that agencies consult with FWS and the trigger for its *requirement* that agencies *1178 shape their actions so as not to jeopardize endangered species.... An agency's obligation to consult is thus *in aid of* its obligation to shape its own actions so as not to jeopardize listed species, not independent of it. *Both* the consultation obligation and the obligation to 'insure' against jeopardizing listed species are triggered

by 'any action authorized, funded, or carried out by such agency,' and *both* apply if such an 'action' is under consideration.

420 F.3d at 961.

In the same vein, but broader, the Ninth Circuit has held generally that the ESA's procedural requirements are as important, and are mandatory to the same degree as its substantive requirements. The procedural aspects of section 7(a)(2), in which the consultation requirement appears, were discussed in the Ninth Circuit by *Thomas v. Peterson*, a case challenging the adequacy of an agency's investigation into the effect of a project on the endangered Rocky Mountain Gray Wolf. 753 F.2d 754, 763 (9th Cir.1985). Although the district court had concluded that the agency had committed only an insignificant procedural violation, the Ninth Circuit disagreed. *Id.* at 763 (stating that the failure "goes beyond the technical violation cited by the district court and is not *de minimis*"). The court went on to explain: "The strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions." *Id.* at 764 (emphasis omitted). The Ninth Circuit has not backed off from the *Thomas* Court's position, repeating it in *Conner v. Burford*, 848 F.2d 1441, 1458 n. 40 (9th Cir.1988) and in *Forest Guardians v. Johanns*, 450 F.3d 455, 457 (9th Cir.2006).

Put together and applied to this case, *Defenders of Wildlife* and the *Thomas* line of cases make it clear that ESA section 7(a)(2) requires that EPA, in contemplating even actions deemed NLAA, "consult" with the Services to ensure that its action be not likely to jeopardize listed species.¹⁵

Meaning of "consultation"

[7] The Services argue that section 7(a)(2)'s injunction to consult "does not address whether an action agency like EPA can make its own 'not likely to adversely affect' determinations without further consultation with the Services." (Fed. Defs.' Mot. 25.) CropLife suggests that section 7(a)(2) "can be read as just requiring agencies to 'insure' against likely jeopardy through some process developed 'in consultation with and with the assistance of' the Service." (CropLife's Mot. 26.)

With respect to the first argument, advanced by the Services, the Court's holding that an NLAA

determination is not equivalent to a section 7(a)(2) determination of "not likely to jeopardize" means that the ESA does not govern how NLAA determinations are to be made. In other words, Defendants are technically correct—NLAA determinations may be made unilaterally. What the ESA *does* do, however, *1179 is govern how an NLAA determination is to be converted into a proper ESA-compliant determination of "not likely to jeopardize." A unilaterally-made NLAA determination cannot be converted into a section 7(a)(2) finding of "not likely to jeopardize" without "consultation" with the relevant Service.

[8] With respect to the second argument, it is true that "consultation" is not defined in the statute. "Consultation" is defined in Black's Law Dictionary, in relevant part, as "[t]he act of asking the advice or opinion of someone (such as a lawyer)" or "a meeting in which parties consult or confer." BLACK'S LAW DICTIONARY (8th ed.2004).

In addition to this ordinary dictionary meaning of the word, the Court must look to the statutory context in which it appears, including "the design of the statute as a whole and ... its object and policy." *Brower*, 257 F.3d at 1065. In the present case, contrary to the Services' assertion that the statute does not "provide any direction or criteria" regarding how the consultation is to be carried out, the statute does contain some highly relevant provisions relating to consultation. First, the "in consultation with" language is paired with "with the assistance of the Secretary." This second part of the clause reinforces the notion that a section 7(a)(2) determination is not to be unilaterally made.

Second, section 7(b)(3)(A) states that after the conclusion of a section 7(a)(2) consultation, the Services "shall provide to the Federal agency ... a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). Third, section 7(a)(2) itself concludes with the admonition that "[i]n fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." Both of these provisions, especially section 7(b)(3)(A), emphasize the rigor of the consultation contemplated by the statute.

In addition to these internal indicators of what is meant by “consultation,” the Court cannot ignore that the ESA mandates that all federal agencies “shall insure” that their actions be not likely to jeopardize listed species.

In light of the ordinary meaning of “consultation,” the ESA's internal express descriptions of “consultation,” and the ESA's substantive mandate, the Court does not find that with the use of the word “consultation” Congress left a “gap” to be filled by the Services. Although it may be true that “Congress left it to the informed discretion of the Services to define the *process of consultation*” (Fed. Defs.' Reply 12 (emphasis added)), Congress did not leave it to the discretion of the Services to define *consultation* in a way that results in no consultation at all on NLAA actions. In other words, while the wording of the statute and the statute's lack of granular direction on the process of consultation may leave it to the discretion of the Services to create a range of types of consultation, “shall ... in consultation with” cannot be read as “no consultation on NLAA actions.”

For these reasons, the Court cannot conclude that the plain meaning of “consultation” contemplates the joint creation of a process by which action agencies may unilaterally make the critical section 7(a)(2) determination regarding NLAA actions.¹⁶ *1180 Accordingly, the Court finds that the portion of the counterpart regulations permitting no Service consultation on NLAA actions fails the *Chevron* step-one test and is therefore not in accordance with the law within the meaning of 5 U.S.C. § 706(2)(A). This portion of the rules must therefore be set aside. 5 U.S.C. § 706(2).

ii. Optional formal consultations

[9] Plaintiffs' complaint also challenges the counterpart regulations as they relate to “optional formal consultations” (Compl. Count V). The “optional formal consultation” provisions permit EPA, as part of its effects determination to be included in a written request for consultation, to propose a jeopardy conclusion and an incidental take statement that may then be adopted by the relevant Service. If the Service adopts EPA's effects determination, it may then issue a written statement doing so, converting EPA's proposal into a Service biological opinion and incidental take statement as required by the ESA. 50 C.F.R. § 402.46. If, on the other hand, the Service

disagrees, it may modify EPA's effects determination or write its own biological opinion.

Plaintiffs state that “[t]he regulations make it relatively simple for the Services to adopt that effects determination as their biological opinion, while erecting additional procedural hurdles if the Services decide to deviate from the EPA draft.” (Pls.' Mot. 16.) They further argue that “[b]ecause they are predicated on the Services' endorsement of EPA's risk assessments, the rule's optional formal consultation procedures also cannot be sustained.” (*Id.* at 26 n. 7.)

None of the parties address the optional formal consultation procedure at any length. However, it is clear that unlike the absolute recusal of the Services in the context of NLAA actions which plainly violated ESA section 7(a)(2)'s mandate to consult, the optional formal consultation procedure still preserves the Services' role. Indeed, though Plaintiffs may be right that the new procedure lowers the barriers to a Service's adoption of EPA conclusions and erects hurdles in the case of disagreement, there is nothing in ESA section 7(a)(2) that prohibits the shifting of burdens in this way. In addition, the Court notes that this alternative method of conducting and completing a “formal consultation” is “optional.”

Because the Services remain free to amend or altogether reject EPA's effects determination in favor of a Service-authored biological opinion, thereby preserving and retaining their consultative role, the Court does not find that the optional formal consultation procedure is inconsistent with ESA section 7(a)(2).

iii. Emergency consultations on FIFRA section 18 registrations

[10] The general consultation regulations permit an action agency, in “situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.,” to consult informally until “the emergency is under control,” at which time formal consultation must be initiated, if necessary. 50 C.F.R. § 402.05. FIFRA section 18 permits EPA *1181 to exempt state and federal agencies from the provisions of FIFRA under “emergency conditions.” 7 U.S.C. § 136p. The counterpart regulations permit EPA to “choose” to employ the emergency consultation procedures on FIFRA section 18 actions—in other words, permitting

EPA to delay formal consultation on FIFRA section 18 actions.

Like the “optional formal consultation” provisions, the emergency consultation provisions are merely optional. Thus, EPA may simply choose not to take advantage of them, thereby preserving the status quo and not altering its consultation habits. However, even if EPA were to use the emergency consultation procedures to the maximum extent permitted under the counterpart regulations, the Court does not find that the temporal shifting of consultations that results is actually inconsistent with ESA section 7(a)(2). As the Court noted *supra* in its discussion of the optional formal consultation provisions, there is nothing in ESA section 7(a)(2) that prohibits the mere shifting about of consultations. Accordingly, the Court does not find that the counterpart regulation provisions regarding FIFRA section 18 registrations are inconsistent with ESA section 7(a)(2).

b. Services' compliance with ESA section 7(a)(2)

[11] The parties appear to disagree as to whether the Services' action in promulgating the counterpart regulation is itself subject to ESA section 7(a)(2)—whether, in other words, the promulgation of the counterpart regulations constitutes an “agency action” under section 7(a)(2). The Court concludes that it does.

“Agency action” is defined by section 7(a)(2) as “any action authorized, funded, or carried out by” a federal agency. 16 U.S.C. § 1536(a)(2). In turn, the term “federal agency” is defined as “any department, agency, or instrumentality of the United States.” 16 U.S.C. § 1532(7).

[12] For the purposes of section 7(a)(2), courts construe “agency action” broadly. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir.1994). “An action is an ‘agency action’ if there is ‘discretionary Federal involvement or control.’ ” *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir.1996). Discretionary involvement or control is found where an agency retains the ability to influence or change a given project. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir.1995). Here, as the promulgators of the counterpart regulations, the Services are undoubtedly free to alter or withdraw them. Therefore, the Court finds that promulgation of the counterpart regulations is an “agency action” within the meaning of ESA section 7(a)(2) and must comply with its terms.

Plaintiffs argue that the Services failed to comply with section 7(a)(2)'s mandates both to “insure” and to use the best science. According to Plaintiffs, the Services failed to insure that the counterpart regulations would be not likely to jeopardize in (1) permitting EPA to use an allegedly scientifically deficient process in its risk assessments, and (2) permitting EPA to invoke emergency consultation procedures across the whole range of FIFRA section 18 registrations. In addition, Plaintiffs argue that the Services, in signing off on EPA's proposed methodologies, themselves failed to use the best available science to insure that the counterpart regulations passed muster with ESA section 7(a)(2) (*i.e.*, that the counterpart regulations will be not likely to jeopardize).¹⁷

***1182 [13]** Plaintiffs urge that the counterpart regulations be set aside as the result of agency action not in accordance with the law.

i. “Insure”

ESA section 7(a)(2)'s mandate to agencies is plainly worded: each agency “shall ... insure that any action ... is not likely to jeopardize.” Plaintiffs argue, in a nutshell, that the Services, in approving the counterpart regulations—namely (1) EPA's proposed risk assessment methodology and the NLAA process and (2) permitting emergency consultation procedures for the whole range of FIFRA section 18 registrations—failed to ensure that the counterpart regulations were “not likely to jeopardize.”¹⁸ For either of these arguments to succeed, Plaintiffs must establish a causal connection between the challenged procedure and risk of jeopardy to listed species. Furthermore, they must show that in concluding that the procedures satisfied the “not likely to jeopardize” standard of the ESA, the Services acted arbitrarily and capriciously.

EPA methodology & NLAA-to-“not likely to jeopardize” process

Counts II, III, and IV encompass Plaintiffs' complaints about the various manifestations of EPA's risk assessment procedures. Specifically, Plaintiffs contend that the process approved by the Services as functionally equivalent to a section 7 consultation is deficient in (1) failing to ensure that EPA considers the full range of scientific and technical data available; (2) permitting EPA not to consider formulations (*i.e.*, to ignore the

effects of “inert” ingredients and other additives); (3) permitting EPA to use recognizedly insufficient surrogate species to fill data gaps; (4) permitting EPA not to consider sublethal effects other than reduced survival and reproductive impairment; and in the context of making NLAA determinations (5) permitting EPA not to consider the environmental baseline; and (6) permitting EPA not to consider indirect and cumulative effects.

Having reviewed the voluminous administrative record in this case, the Court finds that based on the evidence in that record, the Services' decision to permit EPA to make unilateral NLAA determinations and to permit those NLAA determinations to be equivalent to a finding of “not likely to jeopardize” was arbitrary and capricious. The Court's finding is based not only on the positive fact of the extremely strong technical and scientific evidence in the record demonstrating that approval of EPA's risk assessment process fails to “insure” within the meaning of ESA section 7, but also on the negative fact of the total absence of any technical and scientific evidence to support or justify the Services' approval of the process. Thus, this is not a case where there is merely “principled disagreement” between experts within the agency, *see, e.g., Nat'l Wildlife Fed'n v. Norton*, 306 F.Supp.2d 920, 929 n. 15 (E.D.Cal.2004), but one in which the agency experts were in *unanimous* agreement. Indeed, the administrative record is striking in its total lack of any evidence of technical or scientific support for the policy positions ultimately *1183 adopted by the Services in their sign-off letter and in the counterpart regulations.

Nor is this a case in which the final agency action reversed an “initial conclusion” reached by a small subset of individuals within the agency, *see, e.g., Northwest Ecosystem Alliance v. FWS*, No CV03–1505, 2004 WL 1774559, at *4 (D.Or. Aug.2, 2004). Unlike in *Northwest Ecosystem Alliance*, where the FWS was able to cite evidence contrary to the initial conclusion, not only were the conclusions here not merely “initial” but sustained over a long period of time and across several different contexts, but the Service policymakers who wrote the sign-off letter and approved the counterpart regulations also had no reasoned basis upon which to reject the advice of the technical team.

The record reflects a long history of disagreements between the Services and EPA and a general recognition inside the Services that the ESA and FIFRA have very

different purposes. (*See, e.g.*, Jan. 10, 2003 E-mail from Don Knowles (NOAA) (NMFS 434–35) (noting that “we have a long and contentious relationship with epa for over a decade—they have started consultations under section 7(a)1, and then pulled out when we could not reach agreement”).) The Court takes particular note of the fact that the specific problems identified by the technical team in EPA's risk assessment process already had been observed in the context of pre-counterpart regulation pesticide registration activities. For example, in the spring and summer of 2002, NMFS biologists had occasion to comment on EPA determinations regarding a number of pesticides. The comments generally identified shortcomings with EPA's consideration of the best available science, product formulations, and cumulative effects, as well as EPA's problem formulation and its use of the LC50 risk quotient. (*See, e.g.*, July 23, 2002 Comments by Rachel Friedman re: alachlor (NMFS 33–34); Aug. 20, 2002 Comments by Nathaniel Scholz re: propargite initiation package (NMFS 108–09).)

In March 2003, a technical team was formed to “produce a side-by-side comparison of EPA's risk assessment and labeling processes with the Service's effects determinations, conclusions, and mitigation consideration processes.” (NMFS 1333.) “The purpose of this exercise [was] to identify potential gaps between the two processes and to identify potential ways of bridging these gaps, if any.” (*Id.*) Right from the beginning, the team identified the following list of potential concerns:

1. Consideration of effects (sublethal, cumulative, synergistic, etc.).
2. Consideration of inerts, surfactants, degradates, etc.
3. Consideration of estimates of exposure (including increases in acreage; urban usage; drift models; etc.).
4. Consideration of Section 18 and Section 24c actions.
5. Assumptions regarding predictability of implementation and enforcement.
6. Assumptions about the use of surrogates.
7. Definitions of the action and action area.
8. Whether the information provided through EPA's risk assessment processes could be linked together in

a BiOp appropriately to satisfy an APA standard of review.

(*Id.*)

Once the Service assessment was well underway and the team had an opportunity to review EPA's risk assessment procedures, the team confirmed these concerns and repeatedly attempted to understand how the concerns could be mitigated or *1184 addressed. (*See, e.g.*, "Questions regarding EPA's EFED Ecological Risk Assessment Process," (Apr. 6, 2003) (NMFS 1517-23); Apr. 28, 2003 E-mail from Don Knowles (NMFS 1607) (remarking "based on what we do know, we have a substantial disagreement with epa on the adequacy of their processes—such items as the issue of effects (indirect, etc), inerts versus actives, formulations versus actives, exposure estimates, toxicity endpoints, etc."); Aug. 26, 2003 Draft of Tech Team Comments (NMFS 2763-83); Sept. 5, 2003 Tech Team Comments (FWS 030905).)

Despite the consistent and persistent nature of the team's comments and suggestions regarding the non-equivalence between Service effects determinations and EPA's risk assessments, upper-level Service personnel signed off on EPA's risk assessment procedure as functionally equivalent (*i.e.*, providing the same level of protection to endangered species) to a Service analysis without addressing the vast majority of the technical team's concerns. While Defendants are correct that the issue is not whether EPA's process could be better, the issue is whether the Services arbitrarily and capriciously approved a process they knew would be less protective than the consultation process. Thus, the Court does not interpret the technical team's comments as an indictment of EPA's process, nor does the Court fault the sign-off letter's findings that many of the analyses performed by EPA represent the best it can do at this point in time. However, the Court *does* find that the uncorrected deficiencies pointed out in EPA's process beg the question of how the Services justified a finding that EPA's risk assessment *sans* Service concurrence would be as protective to listed species as the risk assessment accompanied by Service concurrence. EPA's risk assessment process is not only less protective than Service determinations, there is overwhelming evidence on the record that without a Service check, EPA risk assessments (leading to pesticide registrations) would actually result in harm to listed species.

As a preliminary matter, and as was noted over and over again by Service scientists, a Service effects determination and an EPA risk assessment have very different points of departure.

The risk framework of FIFRA (no unreasonable adverse effects) does not equate to the survival and recovery framework of the ESA. The risk framework is driven by laboratory tests, models of exposure and occasionally some monitoring information. The ESA framework is an integration of status of the species, environmental background condition, the extent of the action within the action area, as well as laboratory and field testing, modeling and field validation. All of this information feeds into an analysis to support the purpose of the ESA to conserve ecosystems upon which threatened and endangered species rely.

(NMFS 1299.) As one comment explained another key difference between the Services' assessments and other action agencies' assessments:

To prevent [jeopardy to species], the Services must treat evidence and uncertainty differently than most other agencies: to minimize risks to listed species, we conduct our analyses and navigate our decision-making processes to avoid false conclusions at each step of a consultation ... (that is, the Services are biased to avoid the "false negative" conclusion or minimize the risk of Type II error).

Most other agencies, including EPA, conduct their assessments in ways that avoid concluding that agency actions had adverse effects when, in fact, such a conclusion is false (that is, they are biased *1185 to avoid the "false positive" conclusion or minimize the risk of Type I error).

(NMFS 2577.)

Another Service comment addressing why consideration of cumulative effects is essential:

Pesticide mixtures are the norm for many of our watersheds, and it is critical that baseline conditions (or background concentrations of other pesticides) be considered when evaluating the relative toxicity of a registered pesticide. This will be a major sticking point between ESA and FIFRA. Under ESA, the focus is on the species and, since salmon are exposed to pesticide mixtures, mixtures need to be included in the risk assessment. Under FIFRA, the focus is on the chemical and the registration of that chemical alone.

(NMFS 109.)

From a subject matter perspective, where the Services frame their analysis by looking at *species* and their relationships with the natural physical, biotic, and chemical environment, EPA's risk assessment frames its analysis with respect to an *active ingredient*. In other words, EPA's risk assessment, designed to answer a question posed by FIFRA (*i.e.*, whether unreasonable adverse effects would result from use of the pesticide), was not designed to answer the question posed by the ESA (*i.e.*, whether an action may be considered "not likely to jeopardize").¹⁹ Thus, it is not surprising that Service personnel identified significant gaps between the information generated during and by EPA's risk assessment process and the information generated during and by a Service effects determination. What is surprising is that, having acknowledged that these gaps exist, as well as the fact that Service analyses (because of the way they are framed) are more accurate and precise in terms of protecting listed species, the Services ultimately signed off on a largely unchanged EPA risk assessment as functionally equivalent to a Service effects determination.

One of the areas of major concern was EPA's screening models, particularly the GENEEC2 model for aquatic organisms, used to "identify [chemicals] which potentially pose sufficient risk to warrant more detailed modeling." (FWS 030905 at 4.) In particular, Service scientists were concerned that GENEEC2 underestimated exposure for several listed species "because model assumptions are frequently not consistent with the attributes of critical habitat for listed species." (*Id.*

at 5.) For example, the model fails to account for uneven distributions of chemicals resulting from runoff or aerial drift. It also fails to account for the fact that many species pass some part of their lives in pools of water (*i.e.*, shallow puddles, vernal pools, muddy shoreline) significantly unlike the model pool. (*Id.*) Despite these known circumstances in which exposure estimates generated by GENEEC2 might be significantly underestimated, if the LOC for risk to non-target species is not exceeded, EPA "is confident that there is no risk of concern." EPA, OVERVIEW OF THE ECOLOGICAL RISK ASSESSMENT PROCESS IN THE OFFICE OF *1186 PESTICIDE PROGRAMS 41 (Jan. 23, 2004) [hereinafter EPA OVERVIEW]. Indeed, the Services' sign-off letter acknowledges the errors built into GENEEC2, but concludes that the model is still the best available approach for estimating aquatic exposure. (Sign-off Ltr. 15.)

GENEEC2 is of particular concern because Type II errors (false negatives)²⁰ generated by the model will result in unilateral NLAA/"not likely to jeopardize" determinations and will go uncorrected and unverified (*i.e.*, will proceed without Service concurrence about the effects conclusion) under the provisions of the counterpart regulations. Given that the sign-off letter itself acknowledges that GENEEC2 can underestimate exposure (thus resulting in a false conclusion that there is no risk of concern associated with a given chemical), yet approves an analytical process relying solely on GENEEC2 to provide information critical to making an NLAA/"not likely to jeopardize" determination, the Court cannot find that the Services in good faith "insured" that their approval of EPA's process would be "not likely to jeopardize" listed aquatic species.²¹

In the case of terrestrial organisms, Service scientists were concerned that EPA considered only the dietary exposure route even when other routes of exposure (inhalation from soil fumigants or dermal exposure for amphibians that respire through their skin) are the most logical pathway, and even though EPA's human health assessments consider these other routes of exposure. (FWS 030905 at 6.) In such cases, consideration of only the dietary exposure pathway may significantly underestimate risk to listed species. Again, because these exposure estimates are critical at the screening level, an underestimation at the screening level could result in no further ESA-relevant effects analysis being done

before registration of a pesticide. Despite this, and despite acknowledging that exposure may also occur through inhalation or dermal contact, the Services signed off on a process that did not require EPA to take into account information already available regarding alternate exposure pathways at the screening level. The Court finds that this, too, failed to “insure” that the counterpart regulations would be “not likely to jeopardize” listed species.

Also at the screening level, and apart from the possibility of underestimating potential exposure, the technical team was concerned about EPA's reliance on its system of comparing risk quotients to levels of concern (“LOC”) to determine whether a pesticide warrants further analysis before an NLAA/“not likely to jeopardize” determination. As with the exposure models, the technical team was concerned that the relatively generic LOCs employed in many cases were inaccurate and could result in both Type I and Type II errors. (FWS 030905 at 7. *See also* NMFS 4325 (commenting that “[t]he assumptions that go into EFED's risk model do not provide an adequate screen for all listed species”).)

In addition to their comments responding to the counterpart regulations, the record *1187 contains several examples of Service criticism of EPA's use of LOCs in the context of specific pesticide actions.²² Although the team pointed out that EPA itself already uses a different comparison point (no-observed-effect-concentration) (“NOEC”) for certain categories (plants, chronic risk to fish and wildlife),²³ the sign-off letter approved EPA's use of LOCs without consideration of available actual data from toxicology studies and other sources as “using the best available information [and] using it in an approved scientific manner.” (Sign-off Ltr. 18.)

In addition, the technical team also questioned the narrow scope of EPA's inquiry, particularly its focus on the active ingredient alone. The Services were concerned that “the potential exists for a pesticide to cause additive, or synergistic toxicity when it co-occurs with other registered pesticides.... Multiple toxicity effects can be antagonistic, additive, or synergistic.” (NMFS 594.) As with its LOC-related concerns, EPA's single-chemical focus had been a persistent source of concern for the Services. The record contains many instances in which the Services note that EPA fails to consider the environmental baseline (to

account for existing stressors), mixtures and formulations (to account for the effect of other chemicals mixed with the active ingredient under review) and cumulative effects (to account for likely future events).²⁴ In a similar vein, Service scientists have had persistent concerns about EPA's inattention to the full spectrum of indirect effects and sublethal effects beyond growth and reproduction that could nevertheless impact species' survival.²⁵ *1188 Despite these repeatedly mentioned issues, which tend to underestimate the risk posed by a pesticide, the Services ultimately approved a process that permits EPA to make a unilateral NLAA/“not likely to jeopardize” determination without considering these other factors, *even when the data is already available*. More important, the record does not reflect that the Services' approval, which ran counter to its scientists' consensus, was based on any science-based reason (*i.e.*, differences in scientific opinion). Indeed, the record contains evidence that at the time the Services issued their sign-off letter, they were aware that the foregoing problems with the scope of EPA's inquiry had played a part in the registration of two chemicals *known* to have highly toxic effects. (NMFS 1931 (re: acrolein); NMFS 4583 (re: creosote).)

The Court finds that in permitting EPA to disregard known deficiencies in the scope of its inquiry into a pesticide's effects, even where relevant data is already available, the Services failed to insure that the counterpart regulations would be “not likely to jeopardize” listed species.

In addition, in light of the persistence of the technical team's negative comments, and in light of the absence of any reasons or evidence in the record to support the Services' ultimate decision to disregard or discount the technical team's comments, the Court finds that the Services' approval of EPA's screening level processes as adequate to produce a reliable unilateral NLAA/ “not likely to jeopardize” determination was arbitrary and capricious.

Even in cases in which the results produced by GENEEC2 or other screening models trigger further EPA evaluation, the technical team was concerned that several features of EPA's methodology in conducting this further evaluation would still result in frequent Type II errors. In addition to the continued effect of some of the defects at the screening level discussed above, the technical team manifested persisting concern

regarding EPA's data-gathering, including the structure of its required toxicology testing protocols (also an issue at the screening level) and its strategy regarding the open scientific literature. The tech team was also concerned about the discretion given to FEAD (referred to as "professional judgment," EPA OVERVIEW 70) both in deciding whether an action is NLAA or LAA, and in "refining" the assumptions used at the screening level and potentially resulting in a screening-level "may affect" finding being converted *1189 into an NLAA/"not likely to jeopardize" determination.²⁶

With respect to EPA's testing, Service scientists worried that the results of tests performed on surrogate species (as opposed to tests performed on the specific listed species) did not sufficiently take into account the significant uncertainties involved in accepting data from tests on one species as meaningful data about another species. EPA currently does not test reptiles and amphibians. Instead, it tests mallard ducks and bobwhite quails as surrogates for terrestrial-phase amphibians and reptiles, and bluegill sunfish, rainbow trout, and fathead minnows as surrogates for aquatic phase amphibians.

The Service scientists did not condemn the use of surrogates in an absolute sense—rather, they accepted the proposition that "in many instances, no specific data will exist concerning the effect of the pesticide in question on these classes of species, tests using surrogate species will likely constitute the best available information." (NMFS 3455 (FWS notes re: use of surrogate species).) However,

[T]here can be great variability in the sensitivity of species to any given pesticide. EPA's overview of OPP's risk assessment process indicated that the "probability of capturing the most sensitive [bird] species is roughly 0.3%" when considering that only 2 avian species are required to be tested and there are 650 avian species in the US. Additionally, results among standard test species (e.g. the bobwhite and mallard) indicate that it's difficult to make generalizations regarding pesticide sensitivity as responses are often chemical specific and can vary by orders of magnitude even in closely related species.... [G]iven the uncertainty that exists when extrapolating between classes, the FWS believes it makes sense to suggest an even more conservative approach when extrapolating between classes. In addition, implementing extrapolation factors

would provide registrants an incentive to address the uncertainty.²⁷

(NMFS 3455–56.) *See also* EPA OVERVIEW 66.

Despite these comments, and despite the fact that EPA expressly acknowledges the utility of safety or extrapolation factors in its overview document, EPA OVERVIEW 66–67 (even discussing the statistical meaning of different safety factors), EPA's process, as approved by the Services, does not require the use of such factors when surrogate data is used. One Service toxicologist noted that "[s]afety factors could really happen now if they wanted it to—safety factors are inherent to their process." (NMFS 4430.) A number of scientists noted that the use of surrogate data without the application of a safety factor greatly increased the possibility of risk to listed species. (*See, e.g.*, FWS 020514 at 2 (stating that "[t]he existing suite of tests have [*sic*] proven to provide little information of value in predicting potential effects to the many species listed under the ESA"); NMFS 2577 (explaining that "[o]ne of the main problems with surrogates is that we do not know if or to what degree the surrogates *ex situ* responses represent the *ex situ* responses of the species for which they are surrogates.... This problem becomes much larger when we try to make inferences about a species' *1190 *in situ* responses based on the surrogates *ex situ* responses."); NMFS 4325 (commenting that "EPA is essentially ensuring that data sets will continue to be inadequate for amphibians and reptiles by refusing to adopt uncertainty factors or add additional data requirements.").)

In light of the expressly acknowledged fact that safety factors would be more protective of listed species, and in light of the lack of any justification for allowing EPA's process to omit the use of safety factors, the Services failed to "insure" that the counterpart regulations, in permitting EPA not to apply more protective safety factors, was "not likely to jeopardize" listed species.

Also with respect to EPA's species-specific assessments, there was a broad consensus that EPA had failed to explain how it would go about searching for the relevant best available data. From the very beginning (*i.e.*, even prior to the inter-agency discussions regarding the counterpart regulations), Service scientists noted in the context of specific consultation initiation packages

that EPA appeared to have omitted to perform any routine searches of the available scientific literature for relevant data. For example, in a draft of a Service letter to EPA commenting on an initiation package for the chemical propargite, NMFS reminded EPA that, “[i]n the context of pesticides, the best available science includes the primary peer-reviewed scientific literature. It also includes the ‘grey literature’ such as agency technical reports and data submitted to the EPA by pesticide producers during the registration process.” (NMFS 73 (Aug. 20, 2002 Ltr. to A–J Williams).) Because EPA’s initiation package for propargite contained information culled only from the propargite Reregistration Eligibility Document, NMFS commented that “[t]he RED does not necessarily consider the peer-reviewed (or open) scientific literature or other sources of information regarding the potential toxicity of a pesticide to salmonids or other nontarget aquatic organisms. Also, the RED will not contain data from studies published after the document was developed.” (*Id.*)

In mid-October 2002, EPA and Service personnel began to discuss the issue of how to craft a literature search strategy that would satisfy the “best available science” standard. After a little disagreement at the beginning about whether the discussion should be about reaching agreement about what data constituted the best science or about reaching agreement on a search strategy (NMFS 235), the record shows that Service personnel began to work on a document coaching EPA on a literature search strategy (NMFS 243–46). An early draft of this document, titled “Guidance for Conducting Literature Searches for Section 7 Consultations,” recommended that literature searches target several electronic databases as well as conduct paper-based searches. (NMFS 243–44.)

By March 2003, the topic of literature searches had receded in the interagency discussions and a Service comment on the ANPR complained that “EPA’s use of ‘scientific data’ is extremely limited. While they do require that all registrant data be GLP-based, they completely ignore the peer reviewed literature or grey literature.” (NMFS 1300.)

Eventually, EPA proposed that it would routinely search a database called ECOTOX. As explained in the counterpart regulations, “[t]he ECOTOX database is a comprehensive system, maintained by EPA’s ORD, that provides information on chemical effects on ecological species.” 69 Fed.Reg. at 47,747. In addition, “EPA

committed ... also to search the studies that had been submitted [for inclusion in ECOTOX] but not yet processed and those *1191 that were considered and rejected.” (Fed. Defs.’ Opp’n 33.)

Although EPA’s commitment to search ECOTOX was an improvement, the Services commented:

EPA does not obtain all relevant exposure data by using ECOTOX because ECOTOX is an effects-related database, not an exposure database.... [E]xposure is a fundamental piece of ecotoxicology and literature associated with exposure must be identified reviewed *[sic]* to adequately assess potential effects to listed species and their habitat to ensure that risk is not underestimated.

(NMFS 1807 (Minutes from May 19, 2004 EPA–NMFS Mtg.)) In addition, one scientist pointed out that although “a growing body of information demonstrates that terrestrial insects are an important part of juvenile and adult salmonid diets,” ECOTOX does not search on terrestrial insects. (NMFS 1808.)

Furthermore, in an effort to explain and document the qualitative difference between EPA’s ECOTOX search strategy and a broader search strategy, the Services conducted comparative test searches. In one such test, NMFS conducted a literature search on diazinon, salmon, and elements of critical habitat. The broader search (including four databases) yielded seventeen references, whereas the ECOTOX search (on the terms “diazinon” and “salmon”) yielded only two references. (NMFS 3225.) The NMFS scientist conceded that the ECOTOX search “will potentially uncover more data than required by FIFRA regulation” but stated that it was “not likely to yield the best scientific and commercial data available.” (*Id.*) In another example:

It took me about 30 seconds to come up with several times the number of references than were in ECOTOX using just a single outside database.... A search in Toxline using the terms “fenvalerate” and “non-target” came up with

43 references, only 3 of which were in ECOTOX. A search of "fenvalerate" and "bird" produced blatantly applicable papers from major journals with things like "... fenvalerate toxicity in American kestrels ..." in the title that were not in ECOTOX. I can't even begin to imagine how they're populating this database.

(NMFS 3374.) Another search comparing results from ECOTOX and three databases NMFS "would normally use in consultations" found that there was no overlap between the results from ECOTOX and the results from the NMFS sources. (NMFS 3433.) (*See also* NMFS 4970–71.)

In sum, one NMFS individual explained

The information available through the ECOTOX online database and the larger holdings EPA gathers for ECOTOX or other specific projects is designed to gather data on the toxicology of individual chemicals on species of fish and wildlife (it also gathers information on plants, but has less depth on the toxicology of plant taxa). That knowledge base will help EPA resolve *some* of the questions about the toxicology of different compounds, but will not help EPA in decisions that require information on mixtures, interactions, indirect effects, or the biology and ecology of listed species (I use "*some*" because ECOTOX is not a definitive source of data on toxicities associated with mixtures or other interactions).

EPA may assert that they can make defensible "no effect/may potentially affect" determinations without considering information on how a compound works in mixtures, through other interactions (for example, increased toxicities when an animal is stressed, in the presence of chemical cues from predators, etcetera), or through indirect exposure pathways. Similarly, EPA may assert that they *1192 don't need information on the biology and ecology of listed species and their critical habitats to make defensible "no effect/may potentially affect" determinations. However, EPA cannot make defensible "not/likely to adversely affect" determinations without this information.

As a result, ECOTOX will only provide part of the information that EPA will need for its determinations. Therefore, EPA will still need a literature search strategy that is designed to gather this information from sources other than ECOTOX. I don't know how they can meet this requirement without searching the open, scientific literature using search strategies similar to those we identified in our draft letter to EPA.

(NMFS 3501 (Dec. 4, 2003 E-mail from C. Johnson to C. Riley, R. Sayers, J. LaBissonniere, M. Boroja).)

Despite this clearly and cogently stated rationale for why EPA's ECOTOX-centered literature search could not adequately support a risk assessment intended to be functionally equivalent to a Service consultation, a draft of the sign-off letter circulated on December 8, 2003 (NMFS 3538–49) approved EPA's search strategy as adequate. The final sign-off letter endorsed EPA's literature search strategy thus: "The Services agree that the search strategies used by MED to identify information for potential inclusion into the ECOTOX database will retrieve the vast majority of relevant literature on the toxic effects of pesticides to listed species." (Sign-Off Ltr. 12.)

This endorsement, as well as the entire section of the sign-off letter discussing "best science," is very finely crafted to avoid raising the issue of the necessity of information other than information on the toxic effects of pesticides on listed species. In essence, the sign-off letter endorses ECOTOX as "best science" only with respect to more or less direct toxic effects of pesticides on listed species, without mentioning that this body of knowledge represents only one part of the whole body of knowledge Service scientists unanimously regarded as essential to informing a sound determination.

Even where EPA proposes to consider biological, ecological and critical habitat information, the sources proposed for such information do not include the open literature. (Sign-Off Ltr. 12.)

As a result of these deficiencies, EPA's assessment, which may use the best available information with regard to the specific targeted questions it asks,²⁸ is not adequate and does not use the best available information or scientific methodology with respect to protecting listed species. Indeed, *1193 the record (and the above discussion) demonstrates that the question of

protecting listed species is a wider question than whether a particular active ingredient has a more or less direct effect on that species. Accordingly, the Court finds that the Services, in approving EPA's assessment analysis as functionally equivalent to the EPA assessment plus a Service concurrence, and in permitting EPA's assessment to result in a unilateral declaration that an NLAA action is "not likely to jeopardize," failed to comply with ESA section 7's mandate to insure that the counterpart regulations were themselves "not likely to jeopardize" listed species.²⁹ In addition, because the Services fail to provide any support for the positions taken in the sign-off letter, positions that were clearly inconsistent with, and sometimes actually contrary to the findings of the technical team, the Court finds that the Services acted arbitrarily and capriciously.

Although the Services and the Defendant-Intervenors suggest that the possibility of retooling EPA's risk assessment process and the Services' option to terminate the ACA upon a belief that EPA's process is not ESA-compliant may rectify any failure to "insure" in compliance with ESA section 7 (*see* ACA 5 (discussing "Procedures to ensure EPA incorporates advances in the science of ecological risk assessment in making ESA determinations regarding pesticides")), the ACA also provides that previously-made NLAA determinations may not be affected by any such actions (ACA 10). Thus, even were the Services to come to a realization that EPA's process had resulted in erroneous NLAA determinations, those NLAA determinations could not be challenged or disturbed. It is unclear what recourse any party might have in such a situation to compel EPA to reassess its NLAA determinations.

Therefore, the Court finds that in approving an effects determination process known to be deficient and unreliable in many ways, and in agreeing that determinations made pursuant to that process may not be disturbed once they have been made, the Services failed to "insure" that their actions were "not likely to jeopardize."

In sum, the Court finds that the Services acted arbitrarily and capriciously in deciding to promulgate the counterpart regulations in their current state, knowing of the substantial flaws in EPA's methodologies and knowing that these flaws were highly likely (if not certain) to result in an overall under-protection of listed species as compared to the general consultation regulations. In

addition, the overwhelming evidence in the administrative record demonstrates that the Services failed to comply with their ESA section 7 mandate to "insure" that their actions were "not likely to jeopardize" listed species. Accordingly, ***1194** the counterpart regulation provisions regarding NLAA determinations must be set aside under 5 U.S.C. § 706(2)(a).

FIFRA section 18 and "emergencies"

[14] As with the subject of EPA's methodology, the question is whether with respect to FIFRA section 18 actions, the counterpart regulations have retained the overall degree of protection afforded listed species by the general consultation regulations. 51 Fed.Reg. 19,937 (June 3, 1986).

The parties' primary disagreement is whether situations treated by EPA as emergencies under FIFRA section 18 are also properly considered "emergencies" under the ESA and its implementing regulations. The parties are in agreement that the definition of "emergency" in the general regulations leaves some room for interpretation in its use of the word "etc." The Services' Consultation Handbook contains some internal guidance to Service personnel about when an "emergency" exists:

An emergency is a situation involving an act of God, disasters, casualties, national defense or security emergencies, etc., and includes response activities that must be taken to prevent imminent loss of human life or property. Predictable events, like those covered in Emergency Use Permits issued by the Environmental Protection Agency for pesticide applications, usually do not qualify as emergencies under the section 7 regulations unless there is a significant unexpected human health risk.

FWS & NMFS, ENDANGERED SPECIES CONSULTATION HANDBOOK 8-1 (Mar.1998) [hereinafter HANDBOOK]. Plaintiffs contend that neither the general regulations' definition nor the Service handbook guidance permits the wholesale inclusion of the entire range of FIFRA section 18 actions, which include

a large number of repeat exemptions³⁰ and situations involving a potential loss of revenue of 20 percent.

With respect to the repeat exemptions, one scientist commented to the drafting team that he “would still like the opportunity to argue about the legitimacy of using emergency consultation procedures on ‘emergency registrations’ that reoccur year after year.” (FWS 031229b.) The response to this comment was that “requesting the same emergency exemption in repeated years would [not] normally qualify as an ‘emergency.’” (*Id.*) This understanding was shared by EPA, as reflected in a document prepared by EPA in the middle of May 2003, describing EPA’s thoughts on four “high-priority” issues. (NMFS 1813 (E-mail explaining document’s context); FWS 030516b (proposing that “the Services and EPA agree on an interpretation of the current section 7 regulations that would treat all FIFRA emergency exemptions as ‘emergencies’ for the purpose of sec. 402.05, except ‘specific exemptions’ involving use of a pesticide for which an emergency exemption had been approved in the previous year for the same State or Federal agency to address the same pest control problem.”).) Despite this early apparent consensus, by the time the final rule was published, EPA had the option of choosing the emergency consultation procedures over the entire range of ***1195** FIFRA section 18 actions. 69 Fed.Reg. at 47,739–40.

The term “emergency” does not appear in the relevant sections of the ESA. The Federal Defendants are correct that the ESA itself does not prescribe how agencies should consult during an emergency, and that given this gap, the Services were obliged to fill the gap with rational regulations that themselves comply with ESA section 7. The 1986 general consultation regulations prescribed a course of action deemed suitable for emergencies. In so doing, the regulations suggested examples of what types of situations constituted emergencies (*i.e.*, “acts of God, disasters, casualties, national defense or security emergencies, etc.”). 50 C.F.R. § 402.05. Although “emergency” was not actually defined, some guidance may be taken from the examples provided.

“Act of God” is defined in the dictionary as “[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado.” BLACK’S LAW DICTIONARY (8th ed.2004). It is defined in the *Oxford English Dictionary* as the “action of uncontrollable natural forces in causing an

accident, as the burning of a ship by lightning.” OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“OED”). *Black’s* defines “disaster” as “a calamity, a catastrophic emergency,” while the OED defines it as “[a]nything that befalls of ruinous or distressing nature; a sudden or great misfortune, mishap, or misadventure; a calamity.” “Casualty” is defined as “[a] chance occurrence, an accident; *esp.* an unfortunate occurrence, a mishap; now, generally, a fatal or serious accident or event, a disaster,” *Oxford English Dictionary*, and “1. A serious or fatal accident. 2. A person or thing injured, lost, or destroyed,” BLACK’S LAW DICTIONARY.

In addition, “emergency” is defined in the dictionary as “a state of things unexpectedly arising, and urgently demanding immediate action.” OXFORD ENGLISH DICTIONARY.

The overwhelming impression conveyed by these examples of “emergency” and by the general-purpose ordinary language meaning of “emergency” itself includes the element of surprise and unexpectedness. As a result, even though “emergencies” under the general consultation regulations may include situations which do not necessarily involve the potential loss of human life, but only of property, such “emergencies” must also be unpredictable or unexpected in some way. This definition of “emergency,” supported both by its context in the regulation and by its ordinary meaning, does not include those FIFRA section 18 actions involving repeat “specific” exemptions for the same pesticide for the same use site, especially where those specific exemptions have been granted for many years on end.

Indeed, although the section 18 implementing regulations begin by defining a section 18 emergency condition as “an urgent, non-routine situation that requires the use of a pesticide(s)”, 40 C.F.R. § 166.3(d), the regulation continues, saying that an emergency condition

shall be deemed to exist when ... [t]he situation ... [w]ill cause significant economic loss due to: (A) an outbreak or an expected outbreak of a pest; or (B) a change in plant growth or development caused by unusual environmental conditions where such change can be rectified by the use of a pesticide(s).

40 C.F.R. § 166.3(d). This latter part of the regulation effectively neuters the requirement that the situation be “non-routine” (an element akin to the unpredictability element in the general consultation regulations’ understanding of “emergency”) by mandating that an “emergency condition” *shall* be deemed to exist where *1196 significant economic loss is expected due to an outbreak of a pest, without requiring that the outbreak be unexpected or non-routine. Thus, under FIFRA, a situation may legitimately be considered an emergency and subject to section 18 without being “non-routine.”³¹ Accordingly, the Court finds that FIFRA’s definition of “emergency,” and ESA’s definition of “emergency,” while overlapping, are not equivalent to one another.

To come to the contrary conclusion, as the Services did in their counterpart regulations, and to treat *all* FIFRA section 18 emergencies as ESA emergencies is to be less protective of listed species than the general consultation regulations and to fail to comply with ESA section 7’s mandate to “insure” that the counterpart regulations are “not likely to jeopardize” listed species.³²

In addition to the failure to comply with ESA section 7, the Services also acted arbitrarily and capriciously in reaching the conclusion stated in the preamble to the counterpart regulations that “the overwhelming majority of FIFRA emergency exemption actions could properly be considered emergencies for the purposes of § 402.05.” 69 Fed.Reg. at 47,739–40. Not only is it clear that the plain language of the applicable FIFRA regulations goes beyond the plain language of the general consultation regulations, *EPA itself* acknowledged that out of about 500 FIFRA section 18 actions each year, about 400 were repeat specific exemptions for pesticides on the same use sites. (FWS 030516b.)

The Federal Defendants point to no evidence in the record that contradicts or lessens the effect of the above factors. The Court’s own perusal of the record revealed no evidence to support the conclusions stated in the counterpart regulations. Accordingly, the Court finds that the Services acted arbitrarily and capriciously in permitting EPA to use emergency consultation procedures for the whole range of FIFRA section 18 actions. The counterpart regulation provisions regarding emergency consultation procedures for FIFRA section 18

registrations must therefore be set aside pursuant to 5 U.S.C. § 706(2)(a).

ii. Best science

Plaintiffs contend that the Services, in promulgating the counterpart regulations, themselves failed to heed the best scientific and commercial data available. The Court need not address this argument as the relevant analysis would be largely redundant with the Court’s discussion of the Services’ failure to comply with the mandate to “insure.”

2. NEPA challenge

The National Environmental Policy Act (“NEPA”) “encourage[s] productive and enjoyable harmony between man and his environment ... [and] promote[s] efforts which will prevent or eliminate damage to *1197 the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321. In pursuit of these lofty goals, NEPA establishes “action-forcing” procedures that force agencies to take a “hard look” at environmental consequences. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).

NEPA requires that

all agencies of the Federal Government shall ... include in every recommendation or report on ... major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332. This statement is referred to as an environmental impact statement (“EIS”). In determining whether a federal action requires an EIS (*i.e.*, whether

it is a “major” action “significantly affecting the quality of the human environment”), an agency must prepare an environmental assessment (“EA”), 40 C.F.R. § 1501.4(b), that “[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact [(‘FONSI’)]” and which also, among other things, briefly discusses the environmental impact of the proposed action.³³ 40 C.F.R. § 1508.9.

In the present case, the Services prepared an EA in which they found that the counterpart regulations would have no effect on the environment. Accordingly, the Services issued a FONSI. Plaintiffs challenge the EA's findings that the counterpart regulations would have no effect on the environment and contend that the Services should have prepared a full EIS. Plaintiffs also challenge the timing of the Services' NEPA compliance.

a. Timing

[15] With respect to an agency's NEPA compliance, the Ninth Circuit requires that “the comprehensive ‘hard look’ mandated by Congress and required by the statute must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.” *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir.2000). NEPA's implementing regulations state that “[a]gencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” 40 C.F.R. § 1501.2. Accordingly, the Ninth Circuit has found that where an EA is prepared after making an “irreversible and irretrievable commitment of resources,” the agency has acted in an untimely manner. *Metcalf*, 214 F.3d at 1143.

[16] Here, the Federal Defendants do not deny that no mention of NEPA surfaces in the administrative record until April 2004. (FWS 040416.) This was *1198 about three months after the proposed counterpart regulations had already been published and the Services had already issued their sign-off letter. The EA was released on July 2, 2004, touching off a 21-day comment period.³⁴ On Saturday, July 24, 2004, the Services had already drafted a FONSI. (NMFS 5820.) The drafter of the FONSI did not know whether any comments had been submitted in response to the EA. (*Id.*) On Monday, July 26, 2004,

after a flurry of e-mails commenting on the FONSI and reflecting that nobody knew whether any comments had been received, one individual finally informed the group that “[w]e have received a few comments on the EA and I believe that Defenders submitted comments to both NOAA and FWS.” (NMFS 5912.)

The final counterpart regulations were signed by the Services on July 27, 2004, and the FONSI was signed by FWS on July 28, 2004, and by NMFS on July 29, 2004.

It is true that the Ninth Circuit in *Metcalf* disapproved of an agency's NEPA compliance where that compliance was performed after already having signed two agreements binding the agency to support the proposal at issue. 214 F.3d at 1142. Although the Federal Defendants in the present case attempt to differentiate the situation in this case on the basis that the counterpart regulations did not take effect until well after the FONSI had been issued, and also on the basis that the ACA permits the Services to terminate the operation of the counterpart regulations (and is therefore not binding), these arguments fail to account for the spirit of *Metcalf*.

The Ninth Circuit explained that “[t]he Federal Defendants did not engage the NEPA process ‘at the earliest possible time.’ Instead, the record makes clear that the Federal Defendants did not even consider the potential environmental effects of the proposed action until long after they had already committed in writing to support the Makah whaling proposal.” *Id.* at 1143. In the court's preceding discussion of the facts, it noted that the Makah had first asked the Federal Defendants for help in 1995, yet an EA was not prepared until 1997.

The facts here are not so qualitatively different. The timing of the Services' NEPA compliance strongly implies that it was an afterthought, rather than a bona fide attempt to gather information and to analyze the environmental consequences of its actions. Indeed, an e-mail from Julie MacDonald, the FWS deputy assistant secretary, stressed:

Either the Service or NMFS (or some combination) will have to provide environmental documentation for the Pesticide Rule. I have tried unsuccessfully for over a month to get some information on where/who is working on this and what the timeline looks like. I cannot emphasize enough the urgency for completing this work. It would not do at all to have the rule completed and be unable to implement it due to the fact

that the government did not finish the environmental work in a timely fashion.

.....

What is the fastest possible timeline for preparation of the NEPA documents

.....

***1199** I don't want this rule to be delayed because we did not do our NEPA work, and I don't want to miss any important APA steps.

(FWS 040416.) This e-mail strongly suggests that the Services did not engage in their NEPA obligations in good faith or with the intention of permitting input received from the NEPA process to influence their ultimate decision.

Although it may be true that the Services had not *bound* themselves to promulgation of the counterpart regulations, from a practical process point of view, they had gone beyond the point of no return. While this is not a case of absolute irreversibility, it is also not a case involving mere preliminary consideration or a mere identification of a preferred course of action. *Metcalf*, 214 F.3d at 1145.

All the pieces other than the NEPA step were in place to finalize the counterpart regulations. The process of formulating the counterpart regulations had been going on for over a year before NEPA even became a concern (at least as reflected in the administrative record). There is absolutely no evidence in the record that indicates that any comment received during the NEPA process could have had any influence on the Services' promulgation of the counterpart regulations. As in *Metcalf*, the Court finds that the timing of the Services' NEPA compliance "seriously impede[d] the degree to which their planning and decisions could reflect environmental values." 214 F.3d at 1144 (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718–19 (9th Cir.1988)). "By the time the Federal Defendants completed the final EA ... the die already had been cast." *Id.* at 1144. Such tardy NEPA compliance thwarts "NEPA's effectiveness [which] depends entirely on involving environmental considerations in the *initial* decisionmaking process." *Id.* at 1145 (emphasis added).

However, despite the strong rhetoric in *Metcalf*, the court limited its holding "to the unusual facts and circumstances of [that] case." *Id.* Accordingly, although the Court strongly disapproves of the noncommittal manner in which the Federal Defendants chose to perform their NEPA obligations, the Court does not find that the absence of any evidence of sincere interest or alacrity are sufficient for a finding that the Federal Defendants' manner violated NEPA under existing Ninth Circuit caselaw.

b. Substance of the EA

In reviewing an agency's decision not to prepare an EIS under NEPA, [the Court] employ[s] an arbitrary and capricious standard that requires [it] to determine whether the agency has taken a "hard look" at the consequences of its actions, "based its decision on a consideration of the relevant factors," and provided a "convincing statement of reasons to explain why a project's impacts are insignificant."

Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir.2001) (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir.1998), and *Metcalf*, 214 F.3d at 1142).

[A]n EIS *must* be prepared if substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor. To trigger this requirement, a plaintiff need not show that significant effects *will in fact occur*; raising substantial questions whether a project may have a significant effect is sufficient.

Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149–50 (9th Cir.1998) (quotations omitted). In sum, in order to prevail on their NEPA claim, Plaintiffs must show that the Services were arbitrary and capricious in determining that there was no ***1200** substantial question that the counterpart regulations would have no significant effect on the environment.

[17] The Court's review of the administrative record, and the analysis performed with respect to Plaintiff's ESA claims more than suffice to show that it should have been

clear to the Services that there were substantial questions *supra* about the environmental effects of the counterpart regulations. Although the Services now defend their EA findings of no significant impact on the basis that they had found that EPA's process and Service consultations were functionally equivalent, the Court has already found in its discussion above that this finding was contrary to the record and arbitrary and capricious. Accordingly, the Federal Defendants may not now rely on "functional equivalence" to protect their EA and FONSI.

In any case, even if the "functional equivalence" opinion could be defended as a bona fide reasoned opinion, the virtual unanimity of the Service biologists' and toxicologists' criticisms of EPA and their litany of comments regarding the insufficiency of EPA's methods to protect listed species (as discussed *supra*) raises substantial questions about the potential impact of the counterpart regulations on the environment. The presence of this debate within the Services is sufficient to trigger the Services' obligation to prepare an EIS. *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir.1988). Accordingly, the Court finds that Plaintiffs have borne their burden on their NEPA claims as to the NLAA provisions and the emergency consultation provisions.

[18] This holding does not extend to the "optional formal consultation" portion of the counterpart regulations not set aside under 5 U.S.C. § 706(2)(a). Plaintiffs fail to show, and there is no evidence to suggest that the optional formal consultation provisions will have much effect, much less a significant effect, on the consultation process or its results. As the Court noted *supra*, the optional formal consultation provisions permit the Services to choose whether or not to compose their own biological opinion and incidental take statement. If the Services disagree with an EPA draft, there is no Service obligation to adopt that draft. Accordingly, the Court does not find that the optional formal consultation provisions will have a significant impact on either the relationship between

EPA and the Services or on the quality of the human environment.

In sum, the Court finds that the Services violated NEPA by failing to prepare an EIS considering all of the impacts of, and alternatives to, adoption of the NLAA and emergency consultation provisions of the counterpart regulations.

IV. CONCLUSION

In accordance with the foregoing, the Court hereby GRANTS Plaintiffs' motion for summary judgment with respect to the NLAA and emergency consultation provisions of the counterpart regulations and DENIES Plaintiffs' motion with respect to the optional formal consultation provisions. The Defendants' motions for summary judgment are GRANTED with respect to the optional formal consultation provisions and DENIED with respect to the NLAA and emergency consultation provisions.

The NLAA and emergency consultation provisions of the counterpart regulations issued by the Federal Defendants at 69 Fed.Reg. 47,732 (Aug. 5, 2004) are arbitrary and capricious, and contrary to law as set forth above. The Federal Defendants violated NEPA by failing to prepare an EIS properly considering all of the impacts of, and alternatives to, adoption of these provisions.

Accordingly, the Court hereby ORDERS that the NLAA and emergency *1201 consultation provisions be set aside and that the Federal Defendants be enjoined from implementing these provisions.

SO ORDERED this 24th day of August, 2006.

All Citations

457 F.Supp.2d 1158, 64 ERC 1280, 36 Env'tl. L. Rep. 20,190

Footnotes

- 1 Under the default rules (as opposed to the counterpart rules governing FIFRA actions), the Services were required to:
- (1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.
 - (2) Evaluate the current status of the listed species or critical habitat.
 - (3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

- (4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.
- (5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1)-(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.
- (6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.
- (7) Formulate a statement concerning incidental take, if such take may occur.
- (8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.
- (h) Biological opinions. The biological opinion shall include:
 - (1) A summary of the information on which the opinion is based;
 - (2) A detailed discussion of the effects of the action on listed species or critical habitat; and
 - (3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

50 C.F.R. § 402.14(g), (h).

- 2 FIFRA section 18 exemptions allow EPA to permit an otherwise unauthorized use of a pesticide in response to "emergency" conditions.
- 3 The Services and Defendant-Intervenors concede that jurisdiction over Plaintiffs' procedural challenge pursuant to NEPA is proper.
- 4 As the Court observed, *supra* note 3, the Federal Defendants and Defendant-Intervenors have conceded that Plaintiffs have standing for their NEPA challenge.
- 5 As explained by Plaintiffs, WSO identified the following grounds for its nonconcurrence: (1) its "concern that EPA's effects analyses may not be conducted using the 'best scientific and commercial data available' (NMFS 5186)"; (2) the WSO's inability to identify the "action" proposed for consultation (the WSO was particularly concerned about the potential difference between the effect of an active ingredient on its own and an active ingredient when mixed with inert ingredients or other additives); (3) lack of baseline information about listed species spatial and temporal status; (4) lack of complete information about potential exposures, such as exposure to pesticides from residential use and other cumulative exposure; and (5) failure to consider direct sublethal effects beyond growth and reproduction. (Compl. ¶ 47.)
- 6 Although the counterpart regulations permitted this only on the contingency that EPA entered into a suitable Alternative Consultation Agreement, EPA has done so, thereby removing the Services from NLAA cases altogether.
- 7 The Services characterize Plaintiffs' argument thus: "Plaintiffs' central argument is that EPA's risk assessment process will not work and that, as a result, the counterpart regulations will allow EPA to make effects determinations that do not comply with ESA." (Fed. Defs.' Opp'n 9.) Although this characterization captures part of Plaintiffs' argument, it fails to recognize that the thrust of Plaintiffs' Complaint in this lawsuit is that the *Services' abdication of their consultative responsibility permitting* EPA to make non-ESA-compliant effects determinations is itself non-ESA-compliant and was arbitrary and capricious.

- 8 The Services suggest that "in the present case, applying the counterpart regulations will require EPA to first focus on particular pesticides and prepare effects determinations addressing specific species and locations." (Fed. Defs.' Reply 4.) However, materials prepared by EPA are irrelevant to the issue of whether removing the Services from their consultative role violates the ESA.
- 9 In any case, there is already a substantial body of data available regarding the relationship between EPA failures to consult on pesticides and the adverse effects of the registration of those pesticides on listed species. *See, supra*, at 13–15. The Federal Defendants submitted for the Court's review a recently decided Ninth Circuit case, *Earth Island Institute v. Ruthenbeck*, 459 F.3d 954, 958, 961–63 (9th Cir.2006), pertaining to ripeness. The *Earth Island* Court found itself addressing the question of whether a challenge to regulations governing review of decisions implementing forest plans was ripe where the challenged regulations had not yet been applied to a specific case. The *Earth Island* Court found that further factual development was needed before a decision could be rendered because "[t]he record is speculative and incomplete." *Id.* at 963. In contrast, in the case at bar, although the counterpart regulations have not been applied, the particular facts and circumstances of this case and the provenance of the regulations themselves have ensured a very full factual record requiring no speculation at all as to the regulations' effects. Accordingly, the Court does not find that *Earth Island* prevents a finding of ripeness in this case.
- 10 The Services and the Defendant–Intervenors both cite to cases in which courts have found that substantive facial challenges to programmatic decisions are not ripe. However, these cases address substantive challenges to substantive rules, rather than substantive challenges to procedural rules. For example, in *Neighbors of Cuddy Mt. v. Alexander*, 303 F.3d 1059, 1067–68 (9th Cir.2002), the court acknowledged that a challenge to a Land Resources Management Plan ("LRMP"), or a forest-wide plan, would not be ripe. However, both the *Neighbors* Court and the *Ohio Forestry* Court, in discussing LRMPs, make it clear that LRMPs are substantive in nature, even if they operate at a higher level than the site-specific plans governed by the LRMPs. The other cases cited, like *Neighbors*, were squarely governed by the outcome in *Ohio Forestry* and therefore inapposite to the present case.
- 11 The Federal Defendants do point out that the standards "do not conflict but work together," but omit to engage in further explanation. (Fed. Defs.' Reply 11.) Nor does the case to which they cite for this proposition shed much light on how *Salerno* and *Chevron* are to be applied in tandem. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699–700, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995).
- 12 For an exhaustive discussion of the relationship between *Chevron* and *Salerno*, see Stuart Buck, *Salerno v. Chevron: What to Do About Statutory Challenges*, 55 ADMIN. L.REV.. 427 (2003).
- 13 As CropLife points out, Plaintiffs repeatedly misstate the "not likely to jeopardize" language as "will not jeopardize." (CropLife's Mot. 23.) However, as Plaintiffs' arguments do not rely on the inaccurate "will not jeopardize" language, the Court finds that these misstatements are immaterial. In addition, the Court finds it pertinent to note that although *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), from which Plaintiffs quote extensively, addressed an ESA that required agencies to insure "no jeopardy," and we are now operating under an ESA requiring only that agencies insure that an action is "not likely to jeopardize," *TVA v. Hill*'s strong rhetoric still lives. *See, e.g., Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir.1987).
- 14 The Court notes that this conceptual formulation of the issue is joined in or assented to by all of the parties.
- 15 Although the parties engage in some back-and-forth regarding how the consultation requirement is to be construed with respect to agency actions clearly and obviously without any impact on listed species (*e.g.*, the mailing of Social Security checks), this question is not before the Court and need not be decided. (CropLife makes a similar error of scope in characterizing Plaintiffs' argument as asserting that the counterpart regulations are *ultra vires* because they "delegate some Services' [*sic*] duties to EPA"—rather, the relevant issue is a narrower one.) The *Chevron* step-one inquiry is whether Congress has directly spoken to the *precise question* at issue. Here, the precise question is whether ESA section 7(a)(2) permits the adoption of a procedure by which an action agency may unilaterally determine that NLAA actions are also not likely to jeopardize listed species.
- 16 The Services contest Plaintiffs' characterization of the effect of the counterpart regulations as permitting unilateral self-consultation: "To the contrary, EPA and the Services have already consulted on this entire class of agency action." (Fed. Defs.' Mot. 26.) However, the Services cannot refute the fact that what was allegedly "consulted" on was a proposal to minimize or eliminate the Services' contribution to the determination of the "not likely to jeopardize" character of NLAA actions rather than the potential effect of NLAA actions and whether they may properly be deemed "not likely to jeopardize." Although the Services argue that the necessary connection between "NLAA" and "not likely to jeopardize" has been consulted on and approved (*i.e.*, it has been determined that NLAA actions, as a class, are "not likely to jeopardize"),

the Court does not find that this "consultation" regarding an agreement *not to consult* satisfies the statutory "consultation" requirement as to NLAA actions.

- 17 CropLife argues that ESA section 7(a)(2)'s "insure" duty falls on the action agency and suggests that Plaintiffs' effort to enforce the "insure" duty against the Services must fail because the EPA is the action agency. (CropLife's Mot. 37.) However, this argument fails to recognize that though EPA may be the action agency with respect to the actual FIFRA registrations, the *Services* themselves are the action agencies with respect to the adoption of the counterpart regulations.
- 18 Plaintiffs presumably level the same charge against the provision regarding optional formal consultations. However, because the optional formal consultation procedure preserves the Services' role, Plaintiffs cannot establish a sufficiently close causal connection between the alleged deficiency and risk of jeopardy to sustain their burden of proof.
- 19 See *also*, NMFS 595 (draft comments re: EPA consultation initiation package on diazinon) (stating "[t]o summarize, the 'endangered species risk assessment' document for diazinon submitted by EPA contains critical gaps in the problem formulation phase. This is due to the fact that the assessment is predicated on an Environmental Risk Assessment developed for another purpose (*e.g.*, the registration of diazinon) in the context of an entirely different federal statute (FIFRA). Therefore, for the purposes of a section 7 consultation, the problem, assessment endpoints, and risk hypotheses should be revised and re-described.")
- 20 In the discipline of statistics, significance testing can result in two kinds of errors, Type I and Type II. In the context of this case, a Type I error is one in which a pesticide is incorrectly determined to have an effect on listed species, while a Type II error is one in which a pesticide is incorrectly determined *not* to have an effect on listed species.
- 21 Of course, an additional error factor that is external to the GENEEC2 model, and which will also tend to increase Type II errors at the initial screening-level assessment, is that EPA does not routinely consider mixtures of active ingredients (except in the case of terrestrial plants, EPA OVERVIEW 46) or the possibility that "inert" ingredients or other additives may affect the operation or effect of the active ingredient.
- 22 See, *e.g.*, NMFS 1584 (re: diazinon) (stating that "[t]he effects determination submitted by EPA does not adequately define the scientific basis for using the 'standard endangered species criterion....' A pesticide may have multiple modes of action (or toxicity), hence, justification is needed for using LC₅₀ data as the sole means of determining toxicity, to the exclusion of essential physiological and behavioral systems of salmonids"); NMFS 112 (re: propargite); FWS 020627 at 3 (re: atrazine) ("Toxicity studies included by EPA in its final risk calculations for pesticide registrations often are limited to measures of acute mortality, or the pesticide concentrations at which short-term exposure will result in significant mortality in the test organism population. Due to this narrow focus, the ability of a pesticide to elicit a wide range of important sublethal effects often are not known. Furthermore, the Service believes that setting protective levels for pesticides in the environment based on their ability to prevent increased acute lethality is an inadequate level of protection"); NMFS 1931 (commenting that "[t]he recent publication of the effects determination for acrolein and impacts to salmonids states that there is a not likely to adversely effect [*sic*] partly based on uncertainty in being able to generate exposure values and determine risk quotients. The product has a high toxicity to fish, but because of the uncertainty in the exposure analysis a not likely to adversely effect [*sic*] was made."); NMFS 4583 (commenting "[t]o give you an idea of why I'm concerned, I've attached the risk assessment that was released last month to support the reregistration of creosote, which is highly toxic to fish ... [quoting EPA] 'The toxicity of creosote to wildlife and plants is difficult to characterize as there is a very limited amount of data available that addresses that topic' ").
- 23 For example, the tech team suggested that "[t]he use of EC₀₅ ... allows the risk assessment to be a function of the chemical and its properties as opposed to a one-size fits all level of concern." (FWS 030905 at 7.)
- 24 See, *e.g.*, NMFS 108–09 (commenting on five no-effect determinations); NMFS 594 (comments on diazinon consultation initiation package); NMFS 1301; NMFS 2577–78; NMFS 5186 (draft non-concurrence letter re: 28 NLAA initiation packages).
- 25 See, *e.g.*, NMFS 1876 (re: diazinon) (commenting that the full complement of chronic sublethal endpoints would consider "the quantity and quality of the prey base ..., distribution and abundance of floating or submerged vegetation that provides cover for juvenile stages ... reproductive behavior, reproductive success; migratory patterns, rates of growth in individuals, [and] the population dynamics of competitors and predators"); NMFS 5186 (draft non-concurrence letter re: 28 NLAA initiation packages); FWS 020514 (commenting that "EPA's pesticide registration process focuses primarily on lethal effects, failing to adequately account for nonlethal effects that may result. Because of this narrow focus, the abilities of individual pesticides to elicit a wide range of important sub-lethal effects often is not known. For example, EPA may only use data that determine when 50% of the test population dies from exposure to a pollutant within a specified period of time. Sub-lethal or chronic effects, include disruptions or alterations to growth, reproduction, foraging, predator avoidance, etc., that do not directly result in death of the individual; however, such effects may ultimately lead to the death or 'take' of

the individuals. For example, exposure to specific pesticides appears to dull the senses of San Joaquin kit foxes making them 'sluggish' and susceptible to vehicular strike; or, the presence of diazinon in the water column appears to affect the olfactory ability of certain salmonids, limiting their ability to find their natal streams for spawning, thus potentially eliminating all spawning for these species. In each of these examples EPA determined that their registration actions would either not affect these species or would not likely adversely affect them.").

26 This feature of EPA's risk assessment process essentially gives pesticides another chance to overcome a "may affect" finding.

27 Extrapolation factors, also referred to as safety factors, are essentially a discount rate applied to data from a surrogate species to take into account the possibility that data on a surrogate may not accurately represent the potential results from the same test on the actual listed species in question.

28 The Court is not prepared to find that EPA's risk assessment is based on the best scientific and commercial data available. In particular, the Court is concerned about indications that EPA is well aware that some of the baseline assumptions informing its screening-level exposure models are neither accurate nor adequately protective of listed species, yet was unwilling to adjust its screening procedure on a case-by-case basis to take available known information into account. Even the Services' sign-off letter approving EPA's assessment speaks volumes in the random spots of silence therein. For example, with respect to EPA's exposure models, the Services note that the current model for aquatic exposure may underestimate risk in specific circumstances, but conclude that "the existing model represents the *best available approach currently producing data* for estimating aquatic exposure." (Sign-Off Letter 15 (emphasis added).) Nowhere do the Services state that this approach either represents or exploits the best available data. In addition, the record contains several notes indicating that ECOTOX is far from comprehensive, throwing into doubt even the limited assertion that EPA's strategy considers the best science with respect to the narrowly drawn issue of direct toxic effects to species. (See, e.g., NMFS 3374; NMFS 3501.)

29 The Court feels compelled to note that there are disturbing indications in the record that the very structure of the Service-EPA cooperation was engineered (by EPA) to conceal or minimize the positional differences between the Services and EPA. (See, e.g., NMFS 1399 (commenting re: "EPA's anxiety over written records"); NMFS 1505 (reporting to Service team that "[a]s a way thru the problem with us having a written exchange of views, I Xeroxed an [*sic*] handed out again last week the October draft comments.... I asked EPA and USDA to review the comments again and lets see if we can nail down their problem with written exchanges.... It is not our goal to undermine their litigation position, but equally it is our goal to conduct the consultations in compliance with our regs and to build a record in support of our efforts.... As you know, we (FWS and NMFS) have raised this as a concern for a while. Yesterday, we reached an agreement with EPA and USDA that we **have** to find a way to proceed with the exchange of written materials.").)

30 For example, in the state of California, thirteen of twenty-five section 18 exemptions in 2003 were repeats (same use site, same pests) from 2002. FWS 031212m. In another example, informally responding to a request for examples of pesticides registered under section 18 emergency procedures repeatedly for many years, one scientist named eleven pesticides "off the cuff." NMFS 3765. One such pesticide, flowable carbofuran, had been granted repeat exemptions as many as eight times in some states. See also FWS 030516b (commenting that "as a practical matter ... 'repeat' exemptions constitute about 80% of the emergency exemptions each year.").

31 Thus the issue of whether Plaintiffs are presuming that EPA will "abuse" FIFRA section 18 is immaterial. (See Fed. Defs.' Opp'n (arguing that EPA "is entitled to the presumption that it will 'act properly and according to law.' ").) The language of the FIFRA section 18 implementing regulations *permits* EPA to make repeated findings of "emergency" as to the same pesticide for use on the same site.

32 This is not to say that no repeat specific exemptions can ever be eligible for an emergency consultation procedure. For example, a rule permitting emergency consultation for repeat specific exemptions in cases where EPA is undertaking its best efforts to initiate consultation, yet is unable to do so because of reasons beyond its control, would take into account the requirement that an "emergency" have an element of uncontrollability and unexpectedness.

33 Agencies need not prepare EAs if the proposed action is categorically one that requires or does not require an EIS. 40 C.F.R. § 1501.4(a).

34 The administrative record reflects that the Services intended for the comment period to be thirty days (after some initial debate about a fifteen-day period). (See NMFS 5240.) However, after an unexpected 10-day delay in finalizing the draft EA and the notice thereof, the decision was made to shorten the comment period to 21 days. (NMFS 5497 (explaining "As a result of delays in getting the FR notice our [*sic*], we are running into a time constraint. Therefore we would like to change the comment period to 21 days.")).

End of Document

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Message

From: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
Sent: 4/20/2017 5:29:55 PM
To: Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]
CC: Washington, Valerie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d031c02ce3a416dad0d421ee998d5a3-VWASHING]
Subject: RE: Introduction
Attachments: removed.txt

Then I'll send a meeting invitation, for 9:30a-10:30a, at your offices.

Mary Jo Tomalewski

Executive Assistant to the President & CEO
Croplife America
Direct Dial (202) 872-3849
Mobile **Ex. 6**
Email mjtomalewski@croplifeamerica.org



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From: Greenwalt, Sarah [mailto:greenwalt.sarah@epa.gov]
Sent: Thursday, April 20, 2017 1:26 PM
To: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Cc: Washington, Valerie <Washington.Valerie@epa.gov>
Subject: RE: Introduction

Hard stop at 10:30. My calendar fills up quickly!

Sarah A. Greenwalt

Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722 | Cell: **Ex. 6**

Greenwalt.Sarah@epa.gov

From: Mary Jo Tomalewski [mailto:mjtomalewski@croplifeamerica.org]
Sent: Thursday, April 20, 2017 1:12 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: RE: Introduction

Hard stop at 10:30a or 11:30a? I thought your email below said you were free from 10:30-11:30a. ?

Mary Jo Tomalewski

Executive Assistant to the President & CEO

CropLife America
Direct Dial (202) 872-3849
Mobile Ex. 6
Email mjtomalewski@croplifeamerica.org



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From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]
Sent: Thursday, April 20, 2017 1:00 PM
To: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Cc: Washington, Valerie <Washington.Valerie@epa.gov>
Subject: RE: Introduction

I'd be happy to have him here. I do have a hard stop at 10:30 though, so if you'll just give him that heads up I'd appreciate it.

Sarah A. Greenwalt

Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722 | Cell: Ex. 6

Greenwalt.Sarah@epa.gov

From: Mary Jo Tomalewski [<mailto:mjtomalewski@croplifeamerica.org>]
Sent: Thursday, April 20, 2017 12:25 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: RE: Introduction

Sarah,

Jay is wondering if we could make this meeting a face-to-face meeting on Tuesday, rather than a conference call – he's happy to come to your offices or meet you elsewhere if you prefer.

MJ

Mary Jo Tomalewski

Executive Assistant to the President & CEO
CropLife America
Direct Dial (202) 872-3849
Mobile Ex. 6
Email mjtomalewski@croplifeamerica.org



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From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]
Sent: Thursday, April 20, 2017 9:41 AM
To: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Subject: Re: Introduction

That works great, thank you Mary Jo.

Sent from my iPhone

On Apr 20, 2017, at 9:29 AM, Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org> wrote:

Hi, Sarah!

I will send a calendar appointment, for Tuesday, April 25 at 10:30a. Jay will call you on your office line, which I see in your email signature below?

MJ

Mary Jo Tomalewski
Executive Assistant to the President & CEO
CropLife America
Direct Dial (202) 872-3849
Mobile: Ex. 6
Email mjtomalewski@croplifeamerica.org

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From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]
Sent: Wednesday, April 19, 2017 6:30 PM
To: Jay Vroom <JVroom@croplifeamerica.org>
Cc: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Subject: RE: Introduction

Sounds good!

Sarah A. Greenwalt
Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency
Work: 202-564-1722 | Cell: Ex. 6
Greenwalt.Sarah@epa.gov

From: Jay Vroom [<mailto:JVroom@croplifeamerica.org>]
Sent: Wednesday, April 19, 2017 6:20 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>

Cc: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>

Subject: RE: Introduction

OK—let us confirm in the morning as Mary Jo is really in charge of my calendar and I need to double check with her tomorrow first thing. THANKS!

Jay Vroom

President & CEO

CropLife America

Direct Dial: 202.872.3850

Mobile: **Ex. 6**

Executive Assistant: Mary Jo Tomalewski (202.872.3849, mjtomalewski@croplifeamerica.org)

From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]

Sent: Wednesday, April 19, 2017 6:11 PM

To: Jay Vroom <JVroom@croplifeamerica.org>

Subject: Re: Introduction

Sure, I'm free next Tuesday from 10:30-11:30

Sent from my iPhone

On Apr 19, 2017, at 6:06 PM, Jay Vroom <JVroom@croplifeamerica.org> wrote:

Thanks Sarah and Byron!

Unfortunately I'm heading off on a business trip Friday morning early and don't return until Monday night. How about sometime next Tuesday April 25?

Jay

Jay Vroom

President & CEO

CropLife America

Direct Dial: 202.872.3850

Mobile: **Ex. 6**

Executive Assistant: Mary Jo Tomalewski (202.872.3849, mjtomalewski@croplifeamerica.org)

From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]

Sent: Wednesday, April 19, 2017 5:28 PM

To: Brown, Byron <brown.byron@epa.gov>

Cc: Jay Vroom <JVroom@croplifeamerica.org>

Subject: RE: Introduction

Appreciate the introduction, Byron!

Jay, it's nice to meet you electronically. I would love to set up a call to get your take on an ESA issue I've been working on. Do you have any availability for this Friday afternoon?

Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722 | Cell: **Ex. 6**

Greenwalt.Sarah@epa.gov

From: Brown, Byron

Sent: Wednesday, April 19, 2017 12:14 PM

To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>

Cc: vroom@croplifeamerica.org

Subject: Introduction

Hi Sarah – I wanted to introduce you to Jay Vroom of CropLife America. He would be a good resource for ESA issues. - Byron

Jay Vroom

President & CEO

CropLife America

1156 15th Street, NW

Suite 400

Washington, DC 20005

Direct Dial (202) 872-3850

Main Switchboard (202) 296-1585

Mobile **Ex. 6**

Fax (202) 466-5832

Email vroom@croplifeamerica.org

Executive Assistant Mary Jo Tomalewski (mjtomalewski@croplifeamerica.org).

202.872.3849 o, **Ex. 6** n)

Web www.croplifeamerica.org

Byron R. Brown

Deputy Chief of Staff for Policy

Office of the Administrator

U.S. Environmental Protection Agency

Message

From: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
Sent: 4/24/2017 8:17:14 PM
To: Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]
CC: Washington, Valerie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d031c02ce3a416dad0d421ee998d5a3-VWASHING]
Subject: RE: Call with Jay Vroom Tuesday, April 25

Perfect – thank you!

Mary Jo Tomalewski

Executive Assistant to the President & CEO

Croplife America

Direct Dial (202) 872-3849

Mobile [Ex. 6]

Email mjtomalewski@croplifeamerica.org



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From: Greenwalt, Sarah [mailto:greenwalt.sarah@epa.gov]
Sent: Monday, April 24, 2017 4:16 PM
To: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Cc: Washington, Valerie <Washington.Valerie@epa.gov>
Subject: Re: Call with Jay Vroom Tuesday, April 25

Perfect. Always best to email, thank you.

Please have Jay come to the north entrance off of 12th street, right by the federal triangle metro stop. He will need to have an ID ready to show security. Once he is through security he can have them call Valerie so she can bring him up. I have back to back meetings all day and it will be difficult to reach me.

Sent from my iPhone

On Apr 24, 2017, at 3:22 PM, Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org> wrote:

Sarah,

I also just left you a lengthy voice mail. I understand Valerie is out today, so I'm reaching out directly to you.

You and Jay have a call scheduled at 10:30a in the morning. Jay would prefer to meet with you, rather than do a phone call. We are aware that you have a hard-stop at 11:00a --- he does as well, as he has another meeting at 11:15a near the Hill.

If there is anything special we should know regarding security procedures, let me know. Otherwise, I've got it on his calendar to visit EPA headquarters at 1200 Pennsylvania Avenue, NW at 10:30a.

MJ

Mary Jo Tomalewski

Executive Assistant to the President & CEO

CropLife America

1156 15th Street, NW

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Washington, DC 20005

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Main Switchboard (202) 296-1585

Mobile Ex. 6

Fax (202) 466-5832

Email mjtomalewski@croplifeamerica.org

Web www.croplifeamerica.org

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Message

From: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
Sent: 4/24/2017 7:22:22 PM
To: Greenwalt, Sarah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c13775b8f424e90802669b87b135024-Greenwalt,]
Subject: Call with Jay Vroom Tuesday, April 25

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Mary Jo Tomalewski

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Message

From: Greenwalt, Sarah [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=6C13775B8F424E90802669B87B135024-GREENWALT,]
Sent: 4/24/2017 8:15:58 PM
To: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
CC: Washington, Valerie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d031c02ce3a416dad0d421ee998d5a3-VWASHING]
Subject: Re: Call with Jay Vroom Tuesday, April 25

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Executive Assistant to the President & CEO
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Washington, DC 20005
Direct Dial (202) 872-3849
Main Switchboard (202) 296-1585
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Fax (202) 466-5832
Email mjtomalewski@croplifeamerica.org
Web www.croplifeamerica.org

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Message

From: Greenwalt, Sarah [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=6C13775B8F424E90802669B87B135024-GREENWALT,]
Sent: 4/20/2017 5:41:32 PM
To: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
CC: Washington, Valerie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d031c02ce3a416dad0d421ee998d5a3-VWASHING]
Subject: RE: Introduction

Sorry Mary Jo, let me clear up some confusion. I misspoke, our phone call-turned meeting is on my calendar from 10:30 to 11:00. So I have a hard stop at 11:00.

If Jay would like to meet for more than 30 minutes, I could probably move that up to 10:15.

You might work directly with Valerie if you have any changes or questions regarding Jay's visit. That should avoid any misstatements and confusions on my part in the future.

Sarah A. Greenwalt

Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722 | Cell: Ex. 6

Greenwalt.Sarah@epa.gov

From: Mary Jo Tomalewski [mailto:mjtomalewski@croplifeamerica.org]
Sent: Thursday, April 20, 2017 1:30 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Cc: Washington, Valerie <Washington.Valerie@epa.gov>
Subject: RE: Introduction

Then I'll send a meeting invitation, for 9:30a-10:30a, at your offices.

Mary Jo Tomalewski

Executive Assistant to the President & CEO
Croplife America

Direct Dial (202) 872-3849

Mobile: Ex. 6

Email mjtomalewski@croplifeamerica.org



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From: Greenwalt, Sarah [mailto:greenwalt.sarah@epa.gov]
Sent: Thursday, April 20, 2017 1:26 PM
To: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>

Cc: Washington, Valerie <Washington.Valerie@epa.gov>

Subject: RE: Introduction

Hard stop at 10:30. My calendar fills up quickly!

Sarah A. Greenwalt

Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722 | Cell: **Ex. 6**

Greenwalt.Sarah@epa.gov

From: Mary Jo Tomalewski [<mailto:mjtomalewski@croplifeamerica.org>]

Sent: Thursday, April 20, 2017 1:12 PM

To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>

Subject: RE: Introduction

Hard stop at 10:30a or 11:30a? I thought your email below said you were free from 10:30-11:30a. ?

Mary Jo Tomalewski

Executive Assistant to the President & CEO

CropLife America

Direct Dial (202) 872-3849

Mobile: **Ex. 6**

Email mjtomalewski@croplifeamerica.org



How can I serve you today?

Future Meetings

2017 Spring Regulator Conference – April 6-7, Arlington, VA

2017 Annual Meeting – September 22-27, Dana Point, CA

2018 Winter Board of Directors Meeting – March 5-7, Washington, DC

2018 Annual Meeting – September 21-26, The Ritz-Carlton Amelia Island

From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]

Sent: Thursday, April 20, 2017 1:00 PM

To: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>

Cc: Washington, Valerie <Washington.Valerie@epa.gov>

Subject: RE: Introduction

I'd be happy to have him here. I do have a hard stop at 10:30 though, so if you'll just give him that heads up I'd appreciate it.

Sarah A. Greenwalt

Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722 | Cell: **Ex. 6**

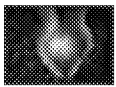
Greenwalt.Sarah@epa.gov

From: Mary Jo Tomalewski [mailto:mjtomalewski@croplifeamerica.org]
Sent: Thursday, April 20, 2017 12:25 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Subject: RE: Introduction

Sarah,

Jay is wondering if we could make this meeting a face-to-face meeting on Tuesday, rather than a conference call – he's happy to come to your offices or meet you elsewhere if you prefer.
MJ

Mary Jo Tomalewski
Executive Assistant to the President & CEO
CroLife America
Direct Dial (202) 872-3849
Mobile Ex. 6
Email mjtomalewski@croplifeamerica.org



How can I serve you today?

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2018 Annual Meeting – September 21-26, The Ritz-Carlton Amelia Island

From: Greenwalt, Sarah [mailto:greenwalt.sarah@epa.gov]
Sent: Thursday, April 20, 2017 9:41 AM
To: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Subject: Re: Introduction

That works great, thank you Mary Jo.

Sent from my iPhone

On Apr 20, 2017, at 9:29 AM, Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org> wrote:

Hi, Sarah!

I will send a calendar appointment, for Tuesday, April 25 at 10:30a. Jay will call you on your office line, which I see in your email signature below?
MJ

Mary Jo Tomalewski
Executive Assistant to the President & CEO
CroLife America
Direct Dial (202) 872-3849
Mobile Ex. 6
Email mjtomalewski@croplifeamerica.org

<image003.jpg> *How can I serve you today?*

Future Meetings

2017 Spring Regulator Conference – April 6-7, Arlington, VA
2017 Annual Meeting – September 22-27, Dana Point, CA

From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]
Sent: Wednesday, April 19, 2017 6:30 PM
To: Jay Vroom <JVroom@croplifeamerica.org>
Cc: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Subject: RE: Introduction

Sounds good!

Sarah A. Greenwalt
Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency
Work: 202-564-1722 | Cell: **Ex. 6**
Greenwalt.Sarah@epa.gov

From: Jay Vroom [<mailto:JVroom@croplifeamerica.org>]
Sent: Wednesday, April 19, 2017 6:20 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Cc: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Subject: RE: Introduction

OK—let us confirm in the morning as Mary Jo is really in charge of my calendar and I need to double check with her tomorrow first thing. THANKS!

Jay Vroom
President & CEO
CropLife America
Direct Dial: 202.872.3850
Mobile: **Ex. 6**
Executive Assistant: Mary Jo Tomalewski (202.872.3849, mjtomalewski@croplifeamerica.org)

From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]
Sent: Wednesday, April 19, 2017 6:11 PM
To: Jay Vroom <JVroom@croplifeamerica.org>
Subject: Re: Introduction

Sure, I'm free next Tuesday from 10:30-11:30

Sent from my iPhone

On Apr 19, 2017, at 6:06 PM, Jay Vroom <JVroom@croplifeamerica.org> wrote:

Thanks Sarah and Byron!

Unfortunately I'm heading off on a business trip Friday morning early and don't return until Monday night. How about sometime next Tuesday April 25?

Jay

Jay Vroom
President & CEO
CropLife America
Direct Dial: 202.872.3850
Mobile: [Ex. 6]
Executive Assistant: Mary Jo Tomalewski (202.872.3849,
mjtomalewski@croplifeamerica.org)

From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]
Sent: Wednesday, April 19, 2017 5:28 PM
To: Brown, Byron <brown.byron@epa.gov>
Cc: Jay Vroom <JVroom@croplifeamerica.org>
Subject: RE: Introduction

Appreciate the introduction, Byron!

Jay, it's nice to meet you electronically. I would love to set up a call to get your take on an ESA issue I've been working on. Do you have any availability for this Friday afternoon?

Sarah A. Greenwalt
Senior Advisor to the Administrator
for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency
Work: 202-564-1722 | Cell: [Ex. 6]
Greenwalt.Sarah@epa.gov

From: Brown, Byron
Sent: Wednesday, April 19, 2017 12:14 PM
To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>
Cc: vroom@croplifeamerica.org
Subject: Introduction

Hi Sarah – I wanted to introduce you to Jay Vroom of CropLife America. He would be a good resource for ESA issues. - Byron

Jay Vroom
President & CEO
CropLife America
1156 15th Street, NW
Suite 400
Washington, DC 20005
Direct Dial (202) 872-3850
Main Switchboard (202) 296-1585
Mobile: [Ex. 6]
Fax (202) 466-5832
Email vroom@croplifeamerica.org
Executive Assistant Mary Jo Tomalewski (mjtomalewski@croplifeamerica.org,
202.872.3849 o, [Ex. 6] m)
Web www.croplifeamerica.org

Byron R. Brown
Deputy Chief of Staff for Policy
Office of the Administrator
U.S. Environmental Protection Agency

Message

From: Greenwalt, Sarah [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=6C13775B8F424E90802669B87B135024-GREENWALT,]
Sent: 4/20/2017 1:41:04 PM
To: Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]
Subject: Re: Introduction

That works great, thank you Mary Jo.

Sent from my iPhone

On Apr 20, 2017, at 9:29 AM, Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org> wrote:

Hi, Sarah!

I will send a calendar appointment, for Tuesday, April 25 at 10:30a. Jay will call you on your office line, which I see in your email signature below?

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Mary Jo Tomalewski

Executive Assistant to the President & CEO

CroLife America

Direct Dial (202) 872-3849

Mobile: **Ex. 6**

Email mjtomalewski@croplifeamerica.org

<image003.jpg> *How can I serve you today?*

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Sent: Wednesday, April 19, 2017 6:30 PM
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Cc: Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>
Subject: RE: Introduction

Sounds good!

Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722 | Cell: **Ex. 6**

Greenwalt.Sarah@epa.gov

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Jay Vroom

President & CEO

CropLife America

Direct Dial: 202.872.3850

Mobile: Ex. 6

Executive Assistant: Mary Jo Tomalewski (202.872.3849, mjtomalewski@croplifeamerica.org)

From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]

Sent: Wednesday, April 19, 2017 6:11 PM

To: Jay Vroom <JVroom@croplifeamerica.org>

Subject: Re: Introduction

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Jay Vroom

President & CEO

CropLife America

Direct Dial: 202.872.3850

Mobile: Ex. 6

Executive Assistant: Mary Jo Tomalewski (202.872.3849, mjtomalewski@croplifeamerica.org)

From: Greenwalt, Sarah [<mailto:greenwalt.sarah@epa.gov>]

Sent: Wednesday, April 19, 2017 5:28 PM

To: Brown, Byron <brown.byron@epa.gov>

Cc: Jay Vroom <JVroom@croplifeamerica.org>

Subject: RE: Introduction

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Sarah A. Greenwalt

Senior Advisor to the Administrator

for Water and Cross-Cutting Issues

U.S. Environmental Protection Agency

Work: 202-564-1722 | Cell: **Ex. 6**

Greenwalt.Sarah@epa.gov

From: Brown, Byron

Sent: Wednesday, April 19, 2017 12:14 PM

To: Greenwalt, Sarah <greenwalt.sarah@epa.gov>

Cc: vroom@croplifeamerica.org

Subject: Introduction

Hi Sarah – I wanted to introduce you to Jay Vroom of CropLife America. He would be a good resource for ESA issues. - Byron

Jay Vroom

President & CEO

CropLife America

1156 15th Street, NW

Suite 400

Washington, DC 20005

Direct Dial (202) 872-3850

Main Switchboard (202) 296-1585

Mobile: **Ex. 6**

Fax (202) 466-5832

Email vroom@croplifeamerica.org

Executive Assistant Mary Jo Tomalewski (mjtomalewski@croplifeamerica.org).

202.872.3849 o, **Ex. 6** (m)

Web www.croplifeamerica.org

Byron R. Brown

Deputy Chief of Staff for Policy

Office of the Administrator

U.S. Environmental Protection Agency

Message

From: Hale, Michelle [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CB99F5247AB8412FA017133839301FEE-HALE, MICHE]
Sent: 5/5/2017 7:11:25 PM
To: Fred Bosco [FBosco@croplifeamerica.org]
Subject: RE: Meeting Participants

Welcome!

From: Fred Bosco [mailto:FBosco@croplifeamerica.org]
Sent: Friday, May 5, 2017 3:10 PM
To: Hale, Michelle <hale.michelle@epa.gov>
Subject: RE: Meeting Participants

Thank you Michelle!

From: Hale, Michelle [mailto:hale.michelle@epa.gov]
Sent: Friday, May 05, 2017 2:49 PM
To: Fred Bosco <FBosco@croplifeamerica.org>
Subject: RE: Meeting Participants

Fred, thank you this is very helpful. Here is Samantha's address and her email is dravis.samantha@epa.gov. Have a wonderful weekend.

Samantha Dravis
1200 Pennsylvania Ave., NW
Room 3513, WJCN
Washington, D.C. 20460

From: Fred Bosco [mailto:FBosco@croplifeamerica.org]
Sent: Friday, May 5, 2017 2:40 PM
To: Hale, Michelle <hale.michelle@epa.gov>
Subject: RE: Meeting Participants

Michelle,
Please find below the mailing addresses for the attendees at yesterday's 4pm meeting with Administrator Pruitt. Similarly, would you be able to provide Samantha Dravis' email address?

Steve Williams
SE Regional Manager
Albaugh, LLC
5029 Gillionville Road
Albany, GA 31721
steve@albaughllc.com

Michael Boden
Head of Crop Protection Sales
Syngenta Crop Protection
410 S. Swing Road
Greensboro, NC 27409

michael.boden@syngenta.com

Spencer Black
Director of Sales
Triangle Chemical Company
PO Box 4528
Macon, GA 31208
JSBlack@trianglecc.com

Jeff Cassady
Executive Vice President
Southern Crop Production Association
PO Box 1586
Reidsville, NC 27323
jeff.cassady@southcrop.org

Bucky Kennedy
State Affairs Director
Southern Crop Production Association
6195 Grier Road
Wetumpka, AL 36092
bucky.kennedy@southcrop.org

Beau Greenwood
Executive Vice President
CropLife America
1156 15th Street NW
Suite 400
Washington, DC 20005
bgreenwood@croplifeamerica.org

Thank you,
Fred

Fred Bosco
Government Relations Coordinator
CropLife America
1156 15th Street NW, Suite 400
Washington, D.C. 20005
P: [] Ex. 6 | F: 202-355-1411
E: FBosco@croplifeamerica.org
W: www.croplifeamerica.org

From: Hale, Michelle [<mailto:hale.michelle@epa.gov>]
Sent: Friday, May 05, 2017 12:19 PM
To: Fred Bosco <FBosco@croplifeamerica.org>
Subject: Meeting Participants

Good afternoon, Administrator Pruitt would like to send notes to those in yesterday's meeting. Would you mind sending me names and addresses?

Thank you.

Michelle Hale
Executive Assistant to the Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., NW,
WJCS, Suite 3000
Washington, D.C. 20460
(202) 564-1430

Confidentiality Warning: This message and any attachments are intended only for the use of the recipient(s), are confidential, and may be privileged. If you are not the intended recipient, you are hereby notified that any review, retransmission, conversion to hard copy, copying, circulation or other use of all or any portion of this message and any attachments is strictly prohibited. If you are not the intended recipient, please notify the sender immediately by return email and delete this message and any attachments from your system.

Message

From: Hale, Michelle [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CB99F5247AB8412FA017133839301FEE-HALE, MICHE]
Sent: 5/4/2017 9:44:54 PM
To: FBosco@croplifeamerica.org
Subject: Photos
Attachments: 2017-05-04_SouthernCrop_002.jpg; 2017-05-04_SouthernCrop_003.jpg; 2017-05-04_SouthernCrop_004.jpg; 2017-05-04_SouthernCrop_005.jpg; 2017-05-04_SouthernCrop_001.jpg

Photos from today's meeting. Thank you for reaching out to us.

Michelle Hale
Executive Assistant to the Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., NW,
WJCS, Suite 3000
Washington, D.C. 20460
(202) 564-1430

Confidentiality Warning: This message and any attachments are intended only for the use of the recipient(s), are confidential, and may be privileged. If you are not the intended recipient, you are hereby notified that any review, retransmission, conversion to hard copy, copying, circulation or other use of all or any portion of this message and any attachments is strictly prohibited. If you are not the intended recipient, please notify the sender immediately by return email and delete this message and any attachments from your system.











Message

From: Albores, Richard [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CE14F8709A5E4AC383AF9D0B767FD8AF-RALBOR02]
Sent: 9/27/2017 6:06:18 PM
To: rlattimore@croplifeamerica.org; syager@beef.org; mhart@beef.org; tward@nahb.org; brooks.smith@troutmansanders.com; akoethe@aar.org; brownl@api.org; wagner@api.org; lindens@api.org; Richard Moskowitz [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=user2443f1e7]; msonnesyn@brt.org; rgoss@itic.org; JRizzo@nahb.org; Jan_Poling@afandpa.org; Michael Formica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=user6d63216b]; ellens@fb.org; ksweeney@nma.org; gcrandall@umwa.org; dell_perelman@americanchemistry.com
CC: OGC HQ ADDs [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3a4f127ecf974bdfb384984d1b28e330-OGC HQ Associates]; OGC RCs Only [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=50b8e2870aec40da80921a62cbf34c23-OGC RCs Onl]; OGC Immediate Office MGMT [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5ce597c53b604d6496992ae8a3bb3e45-OGC FTTA OGC]
Subject: ATTACHED: Attendee Lists Fall Industry Association and EPA OGC Dialogue Meeting
Attachments: OGC Fall Industry Open House Sign-In2017-09-27.pdf

Thank you all for attending today's meeting. I hope you found it informative and interesting. I have attached the sign-in sheets for those who were around the table today (I think we missed a couple attendees). On the phone were Regional Counsels from R1/R5/R6, and reps from the Business Round Table, and another I didn't catch.

Perhaps at our next meeting we can delve further into the APA "no action" issue that was raised. Please send me any follow up thoughts/inquiries, and I will route them as appropriate.

R

~~~~~  
**RICHARD L. ALBORES**

Associate Deputy General Counsel \* Office of General Counsel \* U.S. EPA \* 1200 Pennsylvania Avenue, NW \* MC2310A  
\* Washington, DC 20460 \* email: albores.richard@epa.gov \* phone: 202.564.7102 \* mobile:

Ex. 6

-----Original Appointment-----

**From:** Veney, Carla **On Behalf Of** Minoli, Kevin  
**Sent:** Monday, August 28, 2017 11:56 AM  
**To:** Minoli, Kevin; Fotouhi, David; Baptist, Erik; Schwab, Justin; Albores, Richard; rlattimore@croplifeamerica.org; syager@beef.org; mhart@beef.org; tward@nahb.org; brooks.smith@troutmansanders.com; akoethe@aar.org; brownl@api.org; wagner@api.org; lindens@api.org; rmoskowitz@afpm.org; msonnesyn@brt.org; OGC HQ ADDs; OGC IT Team; OGC RCs Only; EPAVTC; rgoss@itic.org; JRizzo@nahb.org; Jan\_Poling@afandpa.org; formicam@nppc.org; ellens@fb.org; ksweeney@nma.org; gcrandall@umwa.org; dell\_perelman@americanchemistry.com  
**Cc:** Saleem, Nishtar; Payne, James; Briskin, Jeanne; Siciliano, CarolAnn; Smith, Candace; Srinivasan, Gautam; Dierker, Carl; Coe, Mary; Lattimore, Kraig; Koslow, Karin; Dolph, Becky; Fugh, Justina; Michaud, John; Wilkes, Mary; Rhines, Dale; Redden, Kenneth; Nelson, Leverett; Quast, Sylvia; Haskins, Antonio; Lewis, Jen; Logan, Paul; Schmidt, Lorie; Mclean, Kevin; Neugeboren, Steven; Blake, Wendy; Bigioni, Neil; Nunn, Shirlita  
**Subject:** Agenda attached - Fall Industry Association and EPA OGC Dialogue Meeting (Call in number: Ex. 6)  
**Code:** Ex. 6  
**When:** Wednesday, September 27, 2017 12:00 PM-1:00 PM (UTC-05:00) Eastern Time (US & Canada).  
**Where:** EPA Headquarters, 1200 Pennsylvania Ave. NW (William Jefferson Clinton Building), 4th floor, Room 4045



**External guests, please enter via our North side entrance.** Once you have cleared security, someone will come down to escort you to the meeting location. Any logistical questions, please contact 202-564-8040.

ATTENDEE SIGN IN FOR Sept. 27, 2017 INDUSTRY-EPA OPEN HOUSE

[illegible]

ATTENDEE SIGN IN FOR Sept. 27, 2017 INDUSTRY-EPA OPEN HOUSE

[illegible]

Message

---

**From:** Michael Formica [formicam@nppc.org]  
**Sent:** 9/27/2017 4:04:08 PM  
**To:** Minoli, Kevin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c9c0070d651a4625ac20258369f9b050-KMINOLI]  
**CC:** Fotouhi, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=febaf0d56aab43f8a9174b18218c1182-Fotouhi, Da]; Baptist, Erik [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10fc1b085ee14c6cb61db378356a1eb9-Baptist, Er]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; Albores, Richard [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ce14f8709a5e4ac383af9d0b767fd8af-Ralbor02]; rlattimore@croplifeamerica.org; syager@beef.org; mhart@beef.org; tward@nahb.org; brooks.smith@troutmansanders.com; akoethe@aar.org; brownl@api.org; wagner@api.org; lindens@api.org; Richard Moskowitz [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=user2443f1e7]; msonnesyn@brt.org; OGC HQ ADDs [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3a4f127ecf974bfdb384984d1b28e330-OGC HQ Associates]; OGC IT Team [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8b667795ba3e4716864d3646feb49f0c-OGC IT Team]; OGC RCs Only [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=50b8e2870aec40da80921a62cbf34c23-OGC RCs Onl]; EPAVTC [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=328731b6a4a6406488e6d3856817ccf5-EPAVTC]; rgoss@itic.org; JRizzo@nahb.org; Jan\_Poling@afandpa.org; ellens@fb.org; ksweeney@nma.org; gcrandall@umwa.org; dell\_perelman@americanchemistry.com; Saleem, Nishtar [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfd0a9ade51f4627ab8ffc2c0899083f-Nishtar Saleem]; Payne, James [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=61b3204a683041079512b122c580a569-Payne, Jame]; Briskin, Jeanne [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d4f44944371d40819f2da6a900426f1a-Briskin, Jeanne]; Siciliano, CarolAnn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a0e84b7f6ddd4d92b99b2dba90aa86b1-CSICILIA]; Smith, Candace [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c702e7fd48544344976ddebba43d3548-Smith, Candace]; Srinivasan, Gautam [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d69332838210416ba51779b19025f832-GSRINIVA]; Dierker, Carl [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d1f9b7627f8e4efab65f9e9513bf323e-Dierker, Carl]; Coe, Mary [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bd3a8d3b158c48a589da33ccf49a583f-Mcoe]; Lattimore, Kraig [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dd04ae1aa4c64da4967c0f783ae49444-Lattimore, Kraig]; Koslow, Karin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d00aa4f4fead4a3fa02f0cafe57ed221-Koslow, Karin]; Dolph, Becky [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c818363088ca49878e534da81c7d9e6e-DOLPH, BECKY]; Fugh, Justina [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=54afbe2e36d3481c8c52d27ba3979d47-JFUGH]; Michaud, John [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1b492b9143fb48f2b4e1ad2b35d49def-Michaud, John]; Wilkes, Mary [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4795fd5f903446098f7344aee7402ceb-Wilkes, Mary]; Rhines, Dale [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=469a919f86cf4f94ae3710ae6b4b18c6-Rhines, Dal]; Redden, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group

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 [/o=ExchangeLabs/ou=Exchange Administrative Group  
(FYDIBOHF23SPDLT)/cn=Recipients/cn=cfd837ac503949a9820715b53ba921e6-SNEUGEBO]; Blake, Wendy  
 [/o=ExchangeLabs/ou=Exchange Administrative Group  
(FYDIBOHF23SPDLT)/cn=Recipients/cn=902120f35d04482e86206d296ad452fc-Blake, Wendy]

**Subject:**

Re: Agenda attached - Fall Industry Association and EPA OGC Dialogue Meeting (Call in number:

**Ex. 6**

Code:

**Ex. 6**

Thanks. Just got out of court. On the way.

Michael C. Formica  
National Pork Producers Council  
(202) 680-3820

Sent from my SwinePhone

On Sep 27, 2017, at 11:31 AM, Minoli, Kevin <[Minoli.Kevin@epa.gov](mailto:Minoli.Kevin@epa.gov)> wrote:

External guests, please enter via our North side entrance. Once you have cleared security, someone will come down to escort you to the meeting location. Any logistical questions, please contact 202-564-8040.

EPA Regional Counsels, to be connected via video, please use the same room as the Tuesday senior staff meetings if you can. If you will be using a different room, please notify Carla Veney.

EPA VTC, we are asking the regions to please use the same room that is used for the Tuesday OGC Senior staff meetings. Thank you!

<2017 Fall Industry Open House Agenda.pdf>

<meeting.ics>

Message

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**From:** Rachel Lattimore [RLattimore@croplifeamerica.org]  
**Sent:** 6/15/2017 2:15:10 PM  
**To:** Fotouhi, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=febaf0d56aab43f8a9174b18218c1182-Fotouhi, Da]  
**CC:** Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]  
**Subject:** RE: CropLife America Law Committee Meeting June 15

David,

We're happy to have you both join us, and we'll make sure your name gets on the list, thanks.

Best regards,

Rachel

Rachel G. Lattimore  
Senior Vice President, General Counsel, Secretary  
CropLife America  
1156 15<sup>th</sup> Street, NW  
Suite 400  
Washington, DC 20005

**Ex. 6** — direct  
— main  
[rlattimore@croplifeamerica.org](mailto:rlattimore@croplifeamerica.org)  
[www.croplifeamerica.org](http://www.croplifeamerica.org)

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**From:** Fotouhi, David [mailto:fotouhi.david@epa.gov]  
**Sent:** Thursday, June 15, 2017 8:45 AM  
**To:** Rachel Lattimore <RLattimore@croplifeamerica.org>  
**Cc:** Schwab, Justin <schwab.justin@epa.gov>  
**Subject:** RE: CropLife America Law Committee Meeting June 15

Rachel:

Thanks so much for the invitation to this event. I am hopeful that I will be able to join you today along with Justin. If you wouldn't mind adding my name to the security list, I'd appreciate it.

Best regards,

David

**David Fotouhi**

Deputy General Counsel  
Office of General Counsel  
U.S. Environmental Protection Agency  
Tel: +1 202.564.1976  
[fotouhi.david@epa.gov](mailto:fotouhi.david@epa.gov)

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**From:** Rachel Lattimore [<mailto:RLattimore@croplifeamerica.org>]  
**Sent:** Thursday, June 8, 2017 12:32 PM  
**To:** Schwab, Justin <[schwab.justin@epa.gov](mailto:schwab.justin@epa.gov)>  
**Cc:** Fotouhi, David <[fotouhi.david@epa.gov](mailto:fotouhi.david@epa.gov)>  
**Subject:** RE: CropLife America Law Committee Meeting June 15

We hope to use this meeting as an opportunity to introduce you to our committee and some of the issues on which we interact with the agency. There's no need for prepared remarks, but if it would be helpful to you, we could provide a short list of more specific topics. I suspect they would generally track some of the topics raised at the ABA meeting back in April – Endangered Species, Enforcement and Regulatory Reform. I think our members would most appreciate the opportunity to meet you and hear more about your background and work day to day, learn about how Mr. Pruitt's larger plans for the agency might be translated into the work of the Office of Pesticide Programs and OECA, and any other information you could share on what the regulated community can expect in the new administration. I hope this is helpful. Please let me know if you'd like additional topics for discussion or have any other questions.

Best regards,

Rachel

Rachel G. Lattimore  
Senior Vice President, General Counsel, Secretary  
CropLife America  
1156 15<sup>th</sup> Street, NW  
Suite 400  
Washington, DC 20005

**Ex. 6** – direct  
– main  
[rlattimore@croplifeamerica.org](mailto:rlattimore@croplifeamerica.org)  
[www.croplifeamerica.org](http://www.croplifeamerica.org)

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**From:** Schwab, Justin [<mailto:schwab.justin@epa.gov>]  
**Sent:** Thursday, June 8, 2017 10:45 AM  
**To:** Rachel Lattimore <[RLattimore@croplifeamerica.org](mailto:RLattimore@croplifeamerica.org)>  
**Cc:** Fotouhi, David <[fotouhi.david@epa.gov](mailto:fotouhi.david@epa.gov)>  
**Subject:** Re: CropLife America Law Committee Meeting June 15

Thank you. What is the topic? Will I need to have prepared remarks?

Sent from my iPhone

On Jun 8, 2017, at 10:04 AM, Rachel Lattimore <[RLattimore@croplifeamerica.org](mailto:RLattimore@croplifeamerica.org)> wrote:

Justin,

That timing will work well for us. We look forward to seeing you at 1 pm. We'll be in a conference room on the 11<sup>th</sup> floor, 601 Mass Ave., NW. We'll leave your name with building security and they will direct you. Thanks again.

Best regards,

Rachel

Rachel G. Lattimore  
Senior Vice President, General Counsel, Secretary  
CropLife America  
1156 15<sup>th</sup> Street, NW  
Suite 400  
Washington, DC 20005

**Ex. 6**

— direct  
— main

[rlattimore@croplifeamerica.org](mailto:rlattimore@croplifeamerica.org)  
[www.croplifeamerica.org](http://www.croplifeamerica.org)

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**From:** Schwab, Justin [<mailto:schwab.justin@epa.gov>]  
**Sent:** Thursday, June 8, 2017 9:52 AM  
**To:** Rachel Lattimore <[RLattimore@croplifeamerica.org](mailto:RLattimore@croplifeamerica.org)>  
**Cc:** Fotouhi, David <[fotouhi.david@epa.gov](mailto:fotouhi.david@epa.gov)>  
**Subject:** Re: CropLife America Law Committee Meeting June 15

Examining my calendar more closely, 1-2:30 would be ideal (i have a meeting back at EPA that begins at 3).

Sent from my iPhone

On Jun 8, 2017, at 9:50 AM, Schwab, Justin <[schwab.justin@epa.gov](mailto:schwab.justin@epa.gov)> wrote:

Rachel, I would be delighted to attend. 1-3 would work best for me that day.

Please let us know whether and what set topic you would like me/us to discuss, whether you would prefer us to prepare formal remarks, etc.

David, if you are interested and able to attend, would that work for you?

Sent from my iPhone

On Jun 8, 2017, at 9:44 AM, Rachel Lattimore <[RLattimore@croplifeamerica.org](mailto:RLattimore@croplifeamerica.org)> wrote:

Justin,

I'm following up on my invitation from last month to join CropLife America's law committee meeting next Thursday, June 15 at Arnold & Porter, 601 Mass Ave, NW. We'll be meeting from 8:30-4, so if there's an hour or so in that timeframe that would work best for you, please let us know - we can be flexible with other parts of our agenda. I was pleased to meet David Fotouhi at a recent ABA meeting, and extended the invitation to him, as well, so I'm copying David here. I hope one or both of you will be able to join us. Please feel free to get in touch with any questions you might have. Thanks so much for considering this invitation.

Best regards,



Rachel

Rachel G. Lattimore  
Senior Vice President, General Counsel, Secretary  
CropLife America  
1156 15<sup>th</sup> Street, NW  
Suite 400  
Washington, DC 20005

**Ex. 6**

— direct  
— main

[rlattimore@croplifeamerica.org](mailto:rlattimore@croplifeamerica.org)  
[www.croplifeamerica.org](http://www.croplifeamerica.org)

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**From:** Schwab, Justin [<mailto:schwab.justin@epa.gov>]  
**Sent:** Tuesday, May 9, 2017 5:33 PM  
**To:** Rachel Lattimore <[RLattimore@croplifeamerica.org](mailto:RLattimore@croplifeamerica.org)>  
**Subject:** Re: CropLife America Law Committee Meeting June 15

Thank you very much for the invitation. I will have to confer with people here, but this sounds like a good opportunity. Please do check back closer to the date in question.

Sent from my iPhone

On May 9, 2017, at 5:31 PM, Rachel Lattimore  
<[RLattimore@croplifeamerica.org](mailto:RLattimore@croplifeamerica.org)> wrote:

Justin,

Thanks for taking a moment to speak with me yesterday. As you requested, I'm following up by email. I called to thank you again for the interest you expressed in attending the joint ABA-CropLife America legal event we hosted on April 19. I'm sorry that your schedule did not allow you to attend. As I mentioned when we spoke about that event, CLA's Law Committee meets regularly to discuss legal topics of interest to our members, and we occasionally have guest speakers from EPA. I'd like to invite you to attend our next meeting, which will take place Thursday, June 15 at the offices of Arnold & Porter. Our schedule is flexible at this point, so if there's a time that day that would work for your schedule, we'd be happy to set that time for your remarks. If you're available, I'm happy to follow up with you or your admin on details closer to the date. Thank you for considering this request.

Best regards,

Rachel

Rachel G. Lattimore  
Senior Vice President, General Counsel, Secretary  
CroLife America  
1156 15<sup>th</sup> Street, NW  
Suite 400  
Washington, DC 20005

|              |          |
|--------------|----------|
| <b>Ex. 6</b> | - direct |
|              | - main   |

[rlattimore@croplifeamerica.org](mailto:rlattimore@croplifeamerica.org)  
[www.croplifeamerica.org](http://www.croplifeamerica.org)

Message

**From:** Poling, Jan [Jan\_Poling@afandpa.org]  
**Sent:** 8/24/2017 5:40:40 PM  
**To:** Albores, Richard [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ce14f8709a5e4ac383af9d0b767fd8af-Ralbor02]; 'dell\_perelman@americanchemistry.com' [dell\_perelman@americanchemistry.com]; 'lindens@api.org' [lindens@api.org]; 'Wagner@api.org' [Wagner@api.org]; 'brooks.smith@troutmansanders.com' [brooks.smith@troutmansanders.com]; 'mghazal@brt.org' [mghazal@brt.org]; Richard Moskowitz [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=user2443f1e7]; 'rlattimore@croplifeamerica.org' [rlattimore@croplifeamerica.org]; 'cmurray@nafoalliance.org' [cmurray@nafoalliance.org]; 'giordann@nppc.org' [giordann@nppc.org]; 'ellens@fb.org' [ellens@fb.org]; 'ksweeney@nma.org' [ksweeney@nma.org]; 'kkirmayer@aar.org' [kkirmayer@aar.org]; 'jrizzo@nahb.org' [jrizzo@nahb.org]; 'jaugello@nahb.org' [jaugello@nahb.org]; Michael Formica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=user6d63216b]; 'brownl@api.org' [brownl@api.org]; 'tward@nahb.org' [tward@nahb.org]; 'gcrandall@umwa.org' [gcrandall@umwa.org]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; 'syager@beef.org' [syager@beef.org]; Goss, Rick [rgoss@itic.org]; akoethe@aar.org  
**CC:** Packard, Elise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6d4ad4c6abb24f54a2c8c16fa17ba0fd-Packard, El]; Minoli, Kevin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c9c0070d651a4625ac20258369f9b050-KMINOLI]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; Fotouhi, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=febaf0d56aab43f8a9174b18218c1182-Fotouhi, Da]; Veney, Carla [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c354b58bf2b1464d8afac7bbd2a7a88c-CVeney]  
**Subject:** RE: INQUIRY: Fall Industry Association and EPA OGC Dialogue Dates

I can only meet after 2:30 pm on the 28<sup>th</sup> I may send someone in my place if needed

Jan Poling

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**From:** Albores, Richard [mailto:Albores.Richard@epa.gov]  
**Sent:** Thursday, August 24, 2017 1:30 PM  
**To:** 'dell\_perelman@americanchemistry.com' <dell\_perelman@americanchemistry.com>; 'lindens@api.org' <lindens@api.org>; 'Wagner@api.org' <Wagner@api.org>; 'brooks.smith@troutmansanders.com' <brooks.smith@troutmansanders.com>; 'mghazal@brt.org' <mghazal@brt.org>; Richard Moskowitz <rmoskowitz@afpm.org>; 'rlattimore@croplifeamerica.org' <rlattimore@croplifeamerica.org>; 'cmurray@nafoalliance.org' <cmurray@nafoalliance.org>; 'giordann@nppc.org' <giordann@nppc.org>; 'ellens@fb.org' <ellens@fb.org>; 'ksweeney@nma.org' <ksweeney@nma.org>; 'kkirmayer@aar.org' <kkirmayer@aar.org>; Poling, Jan <Jan\_Poling@afandpa.org>; 'jrizzo@nahb.org' <jrizzo@nahb.org>; 'jaugello@nahb.org' <jaugello@nahb.org>; Michael Formica <formicam@nppc.org>; 'brownl@api.org' <brownl@api.org>; 'tward@nahb.org' <tward@nahb.org>; 'gcrandall@umwa.org' <gcrandall@umwa.org>; Schwab, Justin <schwab.justin@epa.gov>; 'syager@beef.org' <syager@beef.org>; Goss, Rick <rgoss@itic.org>; akoethe@aar.org  
**Cc:** Packard, Elise <Packard.Elise@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Veney, Carla <Veney.Carla@epa.gov>  
**Subject:** INQUIRY: Fall Industry Association and EPA OGC Dialogue Dates

Hello all:

I hope you have all had a great summer and are looking forward to a productive and bountiful fall season.

I am writing to determine whether you all would be interested and available to join the Office of General Counsel and our Regional Counsels for a follow up to our February conversation. It has been a busy last six months here at the Agency, and we have been awaiting the appointment of a General Counsel, and hoping to schedule a follow up dialogue with his/her presence. However, as the time continues without clear indications that will continue in the near term, we want to schedule another meeting so we don't lose momentum and we keep the lines of communication open. We would like to provide you with information on how we have divided up roles/responsibilities for our new management team, and introduce our newest political Deputy General counsels (Erik Baptist and David Fotouhi). As you may recall, you met Justin Schwab at our February open house. We also want to hear from you on the legal and policy issues that are important to you and your constituents.

- **Please let me know your availability for a noon meeting here at EPA on either September 27<sup>th</sup> or 28<sup>th</sup> by Friday, September 1.**

We will assess the date that works best for most and send out a meeting invitation with more specific information and instructions for signing into the building.

R

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RICHARD L. ALBORES

Associate Deputy General Counsel * Office of General Counsel * U.S. EPA * 1200 Pennsylvania Avenue, NW * MC2310A
* Washington, DC 20460 * email: albores.richard@epa.gov * phone: 202.564.7102 * mobile:

Ex. 6

Message

From: Michael Formica [formicam@nppc.org]
Sent: 8/24/2017 5:35:21 PM
To: Albores, Richard [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ce14f8709a5e4ac383af9d0b767fd8af-Ralbor02]
CC: dell_perelman@americanchemistry.com; lindens@api.org; Wagner@api.org; brooks.smith@troutmansanders.com; mghazal@brt.org; Richard Moskowitz [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=user2443f1e7]; rlattimore@croplifeamerica.org; cmurray@nafoalliance.org; Nick Giordano [giordann@nppc.org]; ellens@fb.org; ksweeney@nma.org; kkirmayer@aar.org; jan_poling@afandpa.org; jrizzo@nahb.org; jaugello@nahb.org; brownl@api.org; tward@nahb.org; gcrandall@umwa.org; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; syager@beef.org; Goss, Rick [rgoss@itic.org]; akoethe@aar.org; Packard, Elise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6d4ad4c6abb24f54a2c8c16fa17ba0fd-Packard, El]; Minoli, Kevin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c9c0070d651a4625ac20258369f9b050-KMINOLI]; Fotouhi, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=febaf0d56aab43f8a9174b18218c1182-Fotouhi, Da]; Veney, Carla [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c354b58bf2b1464d8afac7bbd2a7a88c-CVeney]
Subject: Re: INQUIRY: Fall Industry Association and EPA OGC Dialogue Dates

Thank you for following up.

Yes I am interested in attending and available on both September 27th and September 28th.

Looking forward to our discussion.

Michael C. Formica
National Pork Producers Council

Ex. 6

Sent from my SwinePhone

On Aug 24, 2017, at 1:29 PM, Albores, Richard <Albores.Richard@epa.gov> wrote:

Hello all:

I hope you have all had a great summer and are looking forward to a productive and bountiful fall season.

I am writing to determine whether you all would be interested and available to join the Office of General Counsel and our Regional Counsels for a follow up to our February conversation. It has been a busy last six months here at the Agency, and we have been awaiting the appointment of a General Counsel, and hoping to schedule a follow up dialogue with his/her presence. However, as the time continues without clear indications that will continue in the near term, we want to schedule another meeting so we don't lose momentum and we keep the lines of communication open. We would like to provide you with information on how we have divided up roles/responsibilities for our new management team, and introduce our newest political Deputy General counsels (Erik Baptist and David Fotouhi). As you may recall, you met Justin Schwab at our February open house. We also want to hear from you on the legal and policy issues that are important to you and your constituents.

- <!--[if !supportLists]--><!--[endif]-->Please let me know your availability for a noon meeting here at EPA on either September 27th or 28th by Friday, September 1.

We will assess the date that works best for most and send out a meeting invitation with more specific information and instructions for signing into the building.

R

~~~~~

**RICHARD L. ALBORES**

Associate Deputy General Counsel \* Office of General Counsel \* U.S. EPA \* 1200 Pennsylvania Avenue, NW \* MC2310A \* Washington, DC 20460 \* email: [albores.richard@epa.gov](mailto:albores.richard@epa.gov) \* phone: 202.564.7102 \* mobile

**Ex. 6**

Message

---

**From:** Rachel Lattimore [RLattimore@croplifeamerica.org]  
**Sent:** 5/9/2017 9:37:22 PM  
**To:** Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]  
**Subject:** RE: CropLife America Law Committee Meeting June 15  
  
**Flag:** Flag for follow up

I'll do that. Thanks so much.

Best regards,

Rachel

Rachel G. Lattimore  
Senior Vice President, General Counsel, Secretary  
CropLife America  
1156 15<sup>th</sup> Street, NW  
Suite 400  
Washington, DC 20005

**Ex. 6** — direct  
— main  
[rlattimore@croplifeamerica.org](mailto:rlattimore@croplifeamerica.org)  
[www.croplifeamerica.org](http://www.croplifeamerica.org)

---

**From:** Schwab, Justin [mailto:schwab.justin@epa.gov]  
**Sent:** Tuesday, May 9, 2017 5:33 PM  
**To:** Rachel Lattimore <RLattimore@croplifeamerica.org>  
**Subject:** Re: CropLife America Law Committee Meeting June 15

Thank you very much for the invitation. I will have to confer with people here, but this sounds like a good opportunity. Please do check back closer to the date in question.

Sent from my iPhone

On May 9, 2017, at 5:31 PM, Rachel Lattimore <[RLattimore@croplifeamerica.org](mailto:RLattimore@croplifeamerica.org)> wrote:

Justin,

Thanks for taking a moment to speak with me yesterday. As you requested, I'm following up by email. I called to thank you again for the interest you expressed in attending the joint ABA-CropLife America legal event we hosted on April 19. I'm sorry that your schedule did not allow you to attend. As I mentioned when we spoke about that event, CLA's Law Committee meets regularly to discuss legal topics of interest to our members, and we occasionally have guest speakers from EPA. I'd like to invite you to attend our next meeting, which will take place Thursday, June 15 at the offices of Arnold & Porter. Our schedule is flexible at this point, so if there's a time that day that would work for your schedule, we'd be happy to set that time for your remarks. If you're available, I'm happy to follow up with you or your admin on details closer to the date. Thank you for considering this request.

Best regards,

Rachel

Rachel G. Lattimore  
Senior Vice President, General Counsel, Secretary  
CropLife America  
1156 15<sup>th</sup> Street, NW  
Suite 400  
Washington, DC 20005

**Ex. 6**

– direct  
– main

[rlattimore@croplifeamerica.org](mailto:rlattimore@croplifeamerica.org)  
[www.croplifeamerica.org](http://www.croplifeamerica.org)



Message

**From:** Albores, Richard [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CE14F8709A5E4AC383AF9D0B767FD8AF-RALBOR02]  
**Sent:** 2/21/2017 11:55:24 PM  
**To:** dell\_perelman@americanchemistry.com; lindens@api.org; Wagner@api.org; brooks.smith@troutmansanders.com; mghazal@brt.org; rmoskowitz@afpm.org; rlattimore@croplifeamerica.org; cmurray@nafoalliance.org; giordann@nppc.org; ellens@fb.org; ksweeney@nma.org; kkirmayer@aar.org; enackman@aar.org; jan\_poling@afandpa.org; jrizzo@nahb.org; jaugello@nahb.org; Michael Formica [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=user6d63216b]; brownl@api.org; tward@nahb.org; OGC HQ ADDs [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3a4f127ecf974bfdb384984d1b28e330-OGC HQ Associates]; Packard, Elise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6d4ad4c6abb24f54a2c8c16fa17ba0fd-Packard, El]; ggrandall@umwa.org; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; OGC RCs Only [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=50b8e2870aec40da80921a62cbf34c23-OGC RCs Onl]; OGC IT Team [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8b667795ba3e4716864d3646feb49f0c-OGC IT Team]; EPAVTC [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=328731b6a4a6406488e6d3856817ccf5-EPAVTC]; Humphrey, Leslie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c8c334c9242e46dbab0a74f9e165b00e-HUMPHREY, LESLIE]; Schefski, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f666f00873dc483ea51b5afadf6d1184-KSCHEFSK]; syager@beef.org  
**Subject:** RESENDING: RE: Industry Association and EPA OGC Dialogue (Video/Call in number: Ex. 6)  
Ex. 6 Agenda  
**Attachments:** 2017 Industry Open House Agenda.pdf  
**Flag:** Flag for follow up

Sorry for the first email. I didn't realize it was sending a link, rather than the actual attached PDF. Still learning how to use Microsoft SharePoint properly...

R

~~~~~  
RICHARD L. ALBORES

Associate Deputy General Counsel * Office of General Counsel * U.S. EPA * 1200 Pennsylvania Avenue, NW * MC2310A
* Washington, DC 20460 * email: albores.richard@epa.gov * phone: 202.564.7102 * mobile: Ex. 6

Industry Representatives Open House

Wednesday, February 22, 2017

12:00 p.m. – 1:00 p.m.

Washington, DC 20460

DRAFT AGENDA

Introductions – 10 min

Introductory Remarks (Kevin Minoli, Acting General Counsel) – 10 min

Effect of Priebus Memo and Trump E.O. on Regulations – Carol Ann Siciliano, Assoc. GC – 5 min

TSCA Section 21 Petition – Kevin Mclean, Assoc. GC – 5 min

Round Table Discussion (Attendees) – 20 min

Legal issues of interest (all)

Next Steps – 10 min

Usefulness of Open House format (all)

Opportunities for EPA to speak at annual meetings of membership (all)

Adjourn

Message

From: Albores, Richard [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CE14F8709A5E4AC383AF9D0B767FD8AF-RALBOR02]
Sent: 2/21/2017 11:05:00 PM
To: dell_perelman@americanchemistry.com; lindens@api.org; Wagner@api.org; brooks.smith@troutmansanders.com; mghazal@brt.org; rmoskowitz@afpm.org; rlattimore@croplifeamerica.org; cmurray@nafoalliance.org; giordann@nppc.org; ellens@fb.org; ksweeney@nma.org; kkirmayer@aar.org; enackman@aar.org; jan_poling@afandpa.org; jrizzo@nahb.org; jaugello@nahb.org; formicam@nppc.org; brownl@api.org; tward@nahb.org; OGC HQ ADDs [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3a4f127ecf974bfdb384984d1b28e330-OGC HQ Associates]; Packard, Elise [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6d4ad4c6abb24f54a2c8c16fa17ba0fd-Packard, El]; ggrandall@umwa.org; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; OGC RCs Only [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=50b8e2870aec40da80921a62cbf34c23-OGC RCs Onl]; OGC IT Team [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8b667795ba3e4716864d3646feb49f0c-OGC IT Team]; EPAVTC [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=328731b6a4a6046488e6d3856817ccf5-EPAVTC]; Humphrey, Leslie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c8c334c9242e46dbab0a74f9e165b00e-HUMPHREY, LESLIE]; Schefski, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f666f00873dc483ea51b5afadf6d1184-KSCHEFSK]; syager@beef.org
CC: Neugeboren, Steven [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfd837ac503949a9820715b53ba921e6-SNEUGEBO]; Siciliano, CarolAnn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a0e84b7f6ddd4d92b99b2dba90aa86b1-CSICILIA]; Fugh, Justina [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=54afbe2e36d3481c8c52d27ba3979d47-JFUGH]; Moora, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b3c997bfd257417dad788dd8da21118b-Moora, Davi]; Redden, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b238fcf051ee4704ba6f56fdfa8566c2-Redden, Kenneth]; Lewis, Jen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ecd7b39ba6f14334bc308b9a3bc2ae5f-JLUE]; Briskin, Jeanne [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d4f44944371d40819f2da6a900426f1a-Briskin, Jeanne]; Dolph, Becky [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c818363088ca49878e534da81c7d9e6e-DOLPH, BECKY]; Mclean, Kevin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=869a9152d655420594d8f94a966b8892-KMCLEAN]; Lee, Terry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bc61b74228cc4c2ab683cfa37516dafb-Lee, Terry]; Dorka, Lilian [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=af796221e00a4a338cea3c72adbd0d57-Dorka, Lill]; Temple, Kurt [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4d2e00dc2545473ba5b73b4893e55b7b-Temple, Kur]; Blake, Wendy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=902120f35d04482e86206d296ad452fc-Blake, Wendy]; Quast, Sylvia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fe20025c1dda47ce92e19f6c3c440c90-SQUAST]; Srinivasan, Gautam [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d69332838210416ba51779b19025f832-GSRINIVA]; Lattimore, Kraig [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dd04ae1aa4c64da4967c0f783ae49444-Lattimore, Kraig]
Subject: RE: Industry Association and EPA OGC Dialogue (Video/Call in number: Ex. 6)

<!--[if lte mso 15 || CheckWebRef]-->

Albores, Richard has shared a OneDrive for Business file with you. To view it, click the link below.

 2017 Industry Open House Agenda.docx

<!--[endif]-->

Attached please find a draft agenda for tomorrow's Open House.

R

~~~~~  
**RICHARD L. ALBORES**

Associate Deputy General Counsel \* Office of General Counsel \* U.S. EPA \* 1200 Pennsylvania Avenue, NW \* MC2310A  
\* Washington, DC 20460 \* email: albores.richard@epa.gov \* phone: 202.564.7102 \* mobile: **Ex. 6**

-----Original Appointment-----

**From:** Minoli, Kevin

**Sent:** Wednesday, February 08, 2017 2:39 PM

**To:** Minoli, Kevin; dell\_perelman@americanchemistry.com; lindens@api.org; Wagner@api.org;  
brooks.smith@troutmansanders.com; mghazal@brt.org; rmoskowitz@afpm.org; rlattimore@croplifeamerica.org;  
cmurray@nafoalliance.org; giordann@nppc.org; ellens@fb.org; ksweeney@nma.org; kkirmayer@aar.org;  
enackman@aar.org; jan\_poling@afandpa.org; jrizzo@nahb.org; jaugello@nahb.org; formicam@nppc.org;  
brownl@api.org; tward@nahb.org; OGC HQ ADDs; Albores, Richard; Packard, Elise; gcrandall@umwa.org; Schwab,  
Justin; OGC RCs Only; OGC IT Team; EPAVTC; Humphrey, Leslie; Schefski, Kenneth; syager@beef.org  
**Cc:** Neugeboren, Steven; Siciliano, CarolAnn; Fugh, Justina; Moora, David; Redden, Kenneth; Lewis, Jen; Briskin, Jeanne;  
Dolph, Becky; Mclean, Kevin; Lee, Terry; Dorka, Lilian; Temple, Kurt; Blake, Wendy; Quast, Sylvia; Srinivasan, Gautam;  
Lattimore, Kraig

**Subject:** Industry Association and EPA OGC Dialogue (Video/Call in number: **Ex. 6**)

**When:** Wednesday, February 22, 2017 12:00 PM-1:00 PM (UTC-05:00) Eastern Time (US & Canada).

**Where:** 1200 Pennsylvania Ave. NW (William Jefferson Clinton Building), 4th Floor, Room 4045

**External guests, please enter via our North side entrance.** Once you have cleared security, someone will come down to escort you to the meeting location.

EPA Regional Counsels, to be connected via video, please use the same room as the Tuesday staff meetings. Thank you!

Message

---

**From:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**Sent:** 7/18/2017 1:42:19 PM  
**To:** Wagner, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=048236ab99bc4d5ea16c139b1b67719c-Wagner, Ken]  
**Subject:** RE: Checking in, time to catch up sometime in next few weeks?

**Importance:** High

Ken,

I had a chance to talk with Jay this morning, and he wants to proceed with an in person meeting. I'm happy to work with your scheduler to get this on the calendar, if you could share with me their name and email address, or forward my email to them.

Otherwise, I can offer the following days and times that Jay is available to meet at your office (or you are welcome to come here):

- Wednesday, July 26 – between 3:00 and 5:00p
- Tuesday, August 1

I look forward to hearing from you or someone from your office. Thank you.  
MJ

*Mary Jo Tomalewski*  
Executive Assistant to the President & CEO  
CropLife America  
Direct Dial ([redacted] Ex. 6)  
Mobile ([redacted] Ex. 6)  
Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)



*How can I serve you today?*

Future Meetings

2017 Spring Regulator Conference – April 6-7, Arlington, VA  
2017 Annual Meeting – September 22-27, Dana Point, CA  
2018 Winter Board of Directors Meeting – March 5-7, Washington, DC  
2018 Annual Meeting – September 21-26, The Ritz-Carlton Amelia Island

---

**From:** Wagner, Kenneth [mailto:wagner.kenneth@epa.gov]  
**Sent:** Friday, July 14, 2017 4:40 PM  
**To:** Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>  
**Subject:** Re: Checking in, time to catch up sometime in next few weeks?

If he's in Oklahoma... I could do a call?

Kenneth E. Wagner  
*Senior Advisor to the Administrator*  
*For Regional & State Affairs*  
**US Environmental Protection Agency**  
Office: 202-564-1988  
Cell: 202-309-2418  
[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)

On Jul 14, 2017, at 3:05 PM, Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)> wrote:

How about Friday, July 21? Jay's open all day.

*Mary Jo Tomalewski*

Executive Assistant to the President & CEO

CropLife America

Direct Dial (202) 872-3849

Mobile (703) 943-9705

Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

<image003.jpg> *How can I serve you today?*

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---

**From:** Wagner, Kenneth [<mailto:wagner.kenneth@epa.gov>]

**Sent:** Friday, July 14, 2017 3:55 PM

**To:** Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)>

**Subject:** Re: Checking in, time to catch up sometime in next few weeks?

I will be at the ECOS meeting as I'm speaking so Monday won't work. Sorry

**Kenneth E. Wagner**

*Senior Advisor to the Administrator*

*For Regional and State Affairs*

**U S Environmental Protection Agency**

**202-564-1988 office**

**202-309-2418 cell**

[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)

On Jul 14, 2017, at 1:32 PM, Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)> wrote:

Ken,

As it happens Jay will be at a meeting at EPA on Monday at 1:00p, which should end by 2:00 or 2:30p. Are you available to meet after that meeting? Or before?

MJ

*Mary Jo Tomalewski*

Executive Assistant to the President & CEO

CropLife America

Direct Dial (202) 872-3849

Mobile (703) 943-9705

Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

<image002.jpg> *How can I serve you today?*

**Future Meetings**

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---

**From:** Mary Jo Tomalewski

**Sent:** Thursday, July 6, 2017 3:56 PM

**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>

**Cc:** Jay Vroom <[JVroom@croplifeamerica.org](mailto:JVroom@croplifeamerica.org)>

**Subject:** FW: Checking in, time to catch up sometime in next few weeks?

**Importance:** High

Ken,

I misspoke – would you be available for a meeting on Monday afternoon, July 17, after 1:00p?

MJ

---

**From:** Mary Jo Tomalewski

**Sent:** Thursday, July 6, 2017 12:18 PM

**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>

**Subject:** RE: Checking in, time to catch up sometime in next few weeks?

Ken,

Would you be available for a phone call with Jay Vroom on Monday afternoon, July 17, after 1:00p?

MJ

*Mary Jo Tomalewski*

Executive Assistant to the President & CEO

CropLife America

Direct Dial (202) 872-3849

Mobile (703) 943-9705

Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

---

**From:** Jay Vroom

**Sent:** Monday, July 3, 2017 10:48 AM

**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>

**Cc:** Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)>

**Subject:** Re: Checking in, time to catch up sometime in next few weeks?

Thanks Ken!

I'm on business travel today through Thursday but think I can tell you about my availability the week of July 17.

I am receiving about 3 discreet international colleague groups that week and am basically tied down with them from noon in Tuesday the 18th until 5 pm on Thursday the 20th. My very best time to catch up would be Tuesday morning the 18th-- and I could make it as early as you like. If that's not possible let's look at Friday?

Jay  
Sent from my iPhone

On Jul 3, 2017, at 8:49 AM, Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)> wrote:

Jay:

I am out until the week of the 17<sup>th</sup>, but would love to catch up then. Wednesday the 19<sup>th</sup> is the best for me (probably in the afternoon). Let me know if that can work.

Hope all is well.

Ken

**Kenneth E. Wagner**  
*Senior Advisor to the Administrator*  
*For Regional and State Affairs*  
**US Environmental Protection Agency**  
**202-564-1988 office**  
**202-309-2418 cell**  
[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)

---

**From:** Jay Vroom [<mailto:JVroom@croplifeamerica.org>]  
**Sent:** Saturday, July 1, 2017 6:04 PM  
**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>  
**Cc:** Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)>  
**Subject:** Checking in, time to catch up sometime in next few weeks?

Hi Ken and happy July!

We have not talked in a while and since the second half of 2017 is now begun I thought it is timely to check in and see if we could get together in the coming weeks?

I'll be on travel for meetings next Wednesday and Thursday following the long holiday weekend but my assistant, Mary Jo, can follow up with you Wednesday to see what might be possible to converge our calendars.

Have a great holiday and enjoy the 4th!

Jay

Jay Vroom  
President & CEO  
CropLife America  
1156 15th Street, NW  
Suite 400



Washington, DC 20005  
202 872 3850 (O)  
202 427 7932 (M)  
[Vroom@croplifeamerica.org](mailto:Vroom@croplifeamerica.org)  
[www.croplifeamerica.org](http://www.croplifeamerica.org)

Message

---

**From:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**Sent:** 7/14/2017 8:04:06 PM  
**To:** Wagner, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=048236ab99bc4d5ea16c139b1b67719c-Wagner, Ken]  
**Subject:** RE: Checking in, time to catch up sometime in next few weeks?

How about Friday, July 21? Jay's open all day.

*Mary Jo Tomalewski*

Executive Assistant to the President & CEO

CroPLife America

Direct Dial ([ ] Ex. 6)

Mobile ([ ] Ex. 6)

Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)



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*Future Meetings*

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**Sent:** Friday, July 14, 2017 3:55 PM  
**To:** Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>  
**Subject:** Re: Checking in, time to catch up sometime in next few weeks?

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**Kenneth E. Wagner**

*Senior Advisor to the Administrator*

*For Regional and State Affairs*

**U S Environmental Protection Agency**

**202-564-1988 office**

**[ ] Ex. 6 } cell**

[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)

On Jul 14, 2017, at 1:32 PM, Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org> wrote:

Ken,

As it happens Jay will be at a meeting at EPA on Monday at 1:00p, which should end by 2:00 or 2:30p. Are you available to meet after that meeting? Or before?

MJ

*Mary Jo Tomalewski*

Executive Assistant to the President & CEO

CroPLife America

Direct Dial ( **Ex. 6** )  
Mobile ( **Ex. 6** )  
Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

<image002.jpg> *How can I serve you today?*

**Future Meetings**

2017 Spring Regulator Conference – April 6-7, Arlington, VA  
2017 Annual Meeting – September 22-27, Dana Point, CA  
2018 Winter Board of Directors Meeting – March 5-7, Washington, DC  
2018 Annual Meeting – September 21-26, The Ritz-Carlton Amelia Island

---

**From:** Mary Jo Tomalewski  
**Sent:** Thursday, July 6, 2017 3:56 PM  
**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>  
**Cc:** Jay Vroom <[jvroom@croplifeamerica.org](mailto:jvroom@croplifeamerica.org)>  
**Subject:** FW: Checking in, time to catch up sometime in next few weeks?  
**Importance:** High

Ken,

I misspoke – would you be available for a meeting on Monday afternoon, July 17, after 1:00p?  
MJ

---

**From:** Mary Jo Tomalewski  
**Sent:** Thursday, July 6, 2017 12:18 PM  
**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>  
**Subject:** RE: Checking in, time to catch up sometime in next few weeks?

Ken,

Would you be available for a phone call with Jay Vroom on Monday afternoon, July 17, after 1:00p?  
MJ

*Mary Jo Tomalewski*  
Executive Assistant to the President & CEO  
CropLife America  
Direct Dial ( **Ex. 6** )  
Mobile ( **Ex. 6** )  
Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

---

**From:** Jay Vroom  
**Sent:** Monday, July 3, 2017 10:48 AM  
**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>  
**Cc:** Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)>  
**Subject:** Re: Checking in, time to catch up sometime in next few weeks?

Thanks Ken!

I'm on business travel today through Thursday but think I can tell you about my availability the week of July 17.

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time to catch up would we Tuesday morning the 18th-- and I could make it as early as you like. If that's not possible let's look at Friday?

Jay  
Sent from my iPhone

On Jul 3, 2017, at 8:49 AM, Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)> wrote:

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I am out until the week of the 17<sup>th</sup>, but would love to catch up then. Wednesday the 19<sup>th</sup> is the best for me (probably in the afternoon). Let me know if that can work.

Hope all is well.

Ken

**Kenneth E. Wagner**  
*Senior Advisor to the Administrator*  
*For Regional and State Affairs*  
**US Environmental Protection Agency**  
**202-564-1988 office**  
Ex. 6 cell  
[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)

---

**From:** Jay Vroom [<mailto:JVroom@croplifeamerica.org>]  
**Sent:** Saturday, July 1, 2017 6:04 PM  
**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>  
**Cc:** Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)>  
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I'll be on travel for meetings next Wednesday and Thursday following the long holiday weekend but my assistant, Mary Jo, can follow up with you Wednesday to see what might be possible to converge our calendars.

Have a great holiday and enjoy the 4th!

Jay

Jay Vroom  
President & CEO  
CropLife America  
1156 15th Street, NW  
Suite 400  
Washington, DC 20005

|       |     |
|-------|-----|
| Ex. 6 | (O) |
| Ex. 6 | (M) |

[Vroom@croplifeamerica.org](mailto:Vroom@croplifeamerica.org)

[www.croplifeamerica.org](http://www.croplifeamerica.org)

Message

---

**From:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**Sent:** 7/14/2017 6:31:00 PM  
**To:** Wagner, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=048236ab99bc4d5ea16c139b1b67719c-Wagner, Ken]  
**Subject:** FW: Checking in, time to catch up sometime in next few weeks?

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As it happens Jay will be at a meeting at EPA on Monday at 1:00p, which should end by 2:00 or 2:30p. Are you available to meet after that meeting? Or before?

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*Mary Jo Tomalewski*  
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Direct Dial ( ) Ex. 6  
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Executive Assistant to the President & CEO

Croplife America

Direct Dial [Ex. 6]

Mobile ([Ex. 6])

Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

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**Kenneth E. Wagner**

*Senior Advisor to the Administrator*

*For Regional and State Affairs*

**US Environmental Protection Agency**

**202-564-1988 office**

[Ex. 6] bell

[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)

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Jay Vroom  
President & CEO  
CropLife America  
1156 15th Street, NW  
Suite 400  
Washington, DC 20005

**Ex. 6** (O)

**Ex. 6** (M)

[Vroom@croplifeamerica.org](mailto:Vroom@croplifeamerica.org)

[www.croplifeamerica.org](http://www.croplifeamerica.org)



Message

---

**From:** Turnbough, Anne [AnneT@amvac-chemical.com]  
**Sent:** 5/15/2017 3:38:09 PM  
**To:** Wagner, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=048236ab99bc4d5ea16c139b1b67719c-Wagner, Ken]  
**CC:** Jay Vroom [JVroom@croplifeamerica.org]; Wintemute, Eric [EricW@amvac-chemical.com]; Donnelly, Tim [TimD@amvac-chemical.com]  
**Subject:** RE: follow up /Request meeting Ken Wagner/ Letter from AMVAC Chemical

Appreciate it Ken,  
Sorry if I just missed your call but was speaking on an internal business call .  
Travel safe and hope to hear from you soon,  
Anne

---

**From:** Wagner, Kenneth [mailto:wagner.kenneth@epa.gov]  
**Sent:** Monday, May 15, 2017 10:36 AM  
**To:** Turnbough, Anne  
**Cc:** Jay Vroom; Wintemute, Eric; Donnelly, Tim  
**Subject:** Re: follow up /Request meeting Ken Wagner/ Letter from AMVAC Chemical

Anne:

I am on a flight from Detroit to DCA and have a pretty full day and have not been in DC since May 5. I have not heard back from the policy folks to whom I forwarded your letter. I am happy to have a call anytime, but figured you would want to visit with someone from the appropriate policy shop. I will follow up today and see what I can find out.

Thanks,

Kenneth E. Wagner  
*Senior Advisor to the Administrator*  
*For Regional & State Affairs*  
**US Environmental Protection Agency**  
Office: 202-564-1988  
Cell: Ex. 6  
[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)

On May 15, 2017, at 10:14 AM, Turnbough, Anne <[AnneT@amvac-chemical.com](mailto:AnneT@amvac-chemical.com)> wrote:

Hi Ken,  
Another follow up.  
I shall try you again via the phone today or feel free to call me at 713-8516076.  
Anne

Anne Turnbough Ph.D.  
Vice President of Regulatory Affairs

AMVAC CHEMICAL  
4695 MacArthur Court  
Suite 1200  
Newport Beach, CA 92660

Cell : **Ex. 6**  
Office: **Ex. 6**

---

**From:** Turnbough, Anne  
**Sent:** Wednesday, May 10, 2017 4:24 PM  
**To:** 'Wagner, Kenneth'  
**Cc:** Jay Vroom; Wintemute, Eric; Donnelly, Tim  
**Subject:** follow up /Request meeting Ken Wagner/ Letter from AMVAC Chemical

Hi Ken,  
I am just following up on my voicemail and previous email to see if we can schedule a call or face to face asap with you directly and/ or your policy advisors ?  
I have copied in Jay Vroom from Crop Life America who originally approached you on this situation who would most likely participate in the discussions.

I would greatly appreciate an update as we are anxious to discuss with you as soon as possible.

Anne

*Anne Turnbough Ph.D.*  
Vice President of Regulatory Affairs

AMVAC CHEMICAL  
4695 MacArthur Court  
Suite 1200  
Newport Beach, CA 92660

Cell : **Ex. 6**  
Office: **Ex. 6**

---

**From:** Wagner, Kenneth [<mailto:wagner.kenneth@epa.gov>]  
**Sent:** Wednesday, May 3, 2017 9:46 PM  
**To:** Turnbough, Anne  
**Subject:** Re: Request meeting Ken Wagner/ Letter from AMVAC Chemical

Anne:

I am glad that you have reached out. I have passed the letter with my explanation of the situation to one of the senior Policy Advisors for fa bit of direction on how best to address the issue. Check back with me at the beginning of next week andI should have some better direction.

Thanks,

Kenneth E. Wagner  
*Senior Advisor to the Administrator*  
*For Regional & State Affairs*  
**US Environmental Protection Agency**

Office: 202-564-1988  
Cell: Ex. 6  
wagner.kenneth@epa.gov

Message

---

**From:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**Sent:** 4/25/2017 5:48:00 PM  
**To:** Wagner, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group  
(FYDIBOHF23SPDLT)/cn=Recipients/cn=048236ab99bc4d5ea16c139b1b67719c-Wagner, Ken]  
**Subject:** call with Jay Vroom

Hi, Ken,

I think you are back this week from a business trip? Jay asked me to reach out again to see about setting up a call, this week. Do you have some time this afternoon? Jay is available this afternoon (with the exception of a 30-minute call today at 4:00p). He's also free tomorrow between 2 and 3p.m., or Thursday between 11:00a and 2:00p.

MJ

*Mary Jo Tomalewski*

Executive Assistant to the President & CEO

CropLife America

1156 15th Street, NW

Suite 400

Washington, DC 20005

Direct Dial

Main Switchboard (202) 296-1585

Mobile (  )

Fax (202) 466-5832

Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

Web [www.croplifeamerica.org](http://www.croplifeamerica.org)



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Message

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**From:** Jay Vroom [JVroom@croplifeamerica.org]  
**Sent:** 4/4/2017 7:28:55 PM  
**To:** Wagner, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=048236ab99bc4d5ea16c139b1b67719c-Wagner, Ken]  
**CC:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**Subject:** Meeting tomorrow at 9:30am at EPA with you/others  
**Attachments:** Elin Miller Bio October 2016[2].pdf; Jay Vroom SHORT bio 01.17.17[1].pdf

Hi Kenneth,

Thanks for taking my call a few minutes ago. Delighted you are able to take a meeting with me and Elin Miller tomorrow (April 5) at 9:30 am at your office.

I've attached short biographical sketches for both Elin and me so you can review those in advance.

Thanks again and look forward to seeing you tomorrow.

Jay

Jay Vroom  
President & CEO  
CropLife America  
1156 15th Street, NW  
Suite 400  
Washington, DC 20005

**Ex. 6**

Vroom@croplifeamerica.org  
www.croplifeamerica.org



**Elin Miller**

---

Elin D. Miller is principal of Elin Miller Consulting, LLC and works with her husband on their Hazelnut Farm in Umpqua, OR, where they recently began a wine grape venture. She serves as Vice Chair of the Vestaron Board, a crop protection corporation in Michigan. Elin also serves on the CNFA and CNFA Europe Boards, corporations active in international agricultural development. Locally, she has chaired the Board of NeighborWorks® Umpqua 2014-2016, a not-for-profit corporation with \$80 million in assets and serves on Umpqua Bank's Regional Board. In May of 2011, she won her first race for public office, elected to the Umpqua Community College Board of Trustees and served four years including Chair and Vice Chair. Elin was elected to the Marrone Bio Innovations Corporation board in 2011 and served as its Chair from 2013-2015. The National FFA (Future Farmers of America) Foundation Board elected Elin to serve as Chair in 2015. Previously, she chaired the National FFA Individual Giving Council 2012-2013.

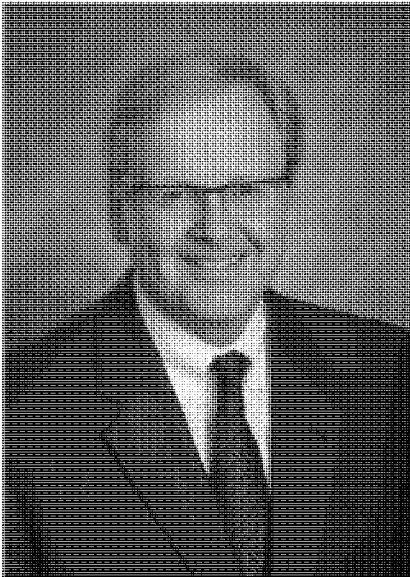
From 2006-2009, Elin served as Regional Administrator for the Environmental Protection Agency, a Presidential Appointment, with jurisdiction over Alaska, Idaho, Washington and Oregon. She successfully led the 600 employee organization balancing the complex environmental challenges of the largest mines and Superfund sites in the world along with contentious issues of Oil and Gas Drilling in Alaska, Climate Change and precedent setting Clean Water Act decisions.

Elin served as President and CEO of Arysta Life Science North America/Australasia 2004-2006, a Crop Protection Company. From 1996 to 2004 she held various positions at the Dow Chemical Company including Global Vice President of Public Affairs, VP of Global Pest Management and VP of Asia Pacific. She also served as an Ex-Officio member of the Dow Board and on Dow AgroSciences Growth Board directing agriculture R&D priorities.

Miller's earlier government service occurred in the 90's as an appointee of California's Governor Wilson as Director of the Department of Conservation (Senate Confirmed) and Chief Deputy Director of the California Department of Pesticide Regulation, CalEPA. Miller's background also includes National Vice President of Future Farmers of America (FFA) and Executive Director for the Western Agricultural Chemicals Association. While in California, she was honored to receive the Outstanding Regulator and Outstanding Contribution to Agriculture Awards. Elin led a successful \$12 million dollar campaign changing public sentiment defeating a significant ballot initiative in CA. She has been honored with various state and national awards including the Lea S. Hitchner Award, the highest award given by CropLife America. Miller was also named one of the "50 Most Powerful Women in PR" by PR WEEK. In 2016, she received the VIP Citation, the highest award given by FFA.

She was a Rhodes scholarship finalist, Outstanding Woman Graduate and Student Body VP when she received her bachelor's degree in agronomy and plant protection from the University of Arizona in 1982. Elin graduated from INSEAD's Advanced Management Program in France in 2000.





Jay Vroom has served as President and CEO of the trade association known as CropLife America (CLA) since 1989. CLA is the leading U.S. trade group for the crop protection industry in the U.S.

Vroom is a founding member of the CropLife Foundation, serving as chairman since its inception in 2001, and now serves as the Foundation's Vice-Chair, since 2015.

His sits of the Board of Directors for the Agricultural Retailers Association, Asmark, National Wheat Foundation, the National Association of Manufacturers Council of Manufacturing Associations, and the Soil Health Institute. He is also a member of the Farm Foundation Roundtable Steering Committee, and the North American Climate Smart Ag Alliance Steering Committee.

Vroom was a member of the youth organization, Future Farmers of America, and served as an elected state officer in Illinois. Today, he is a member of the FFA Foundation's Individual Giving Council and Board of Trustees.

Vroom co-chairs the Coalition for the Advancement of Precision Agriculture and the CEO Council.

He is a member of the Friends of the National Arboretum (FONA) FONA Council.

He graduated with honors from the College of Agriculture, Consumer and Environmental Sciences at the University of Illinois Urbana-Champaign. Vroom was raised on a grain and livestock farm in north-central Illinois and continues to own the farming operation.



Message

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**From:** Wagner, Kenneth [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=048236AB99BC4D5EA16C139B1B67719C-WAGNER, KEN]  
**Sent:** 7/19/2017 8:29:35 PM  
**To:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**Subject:** Re: Checking in, time to catch up sometime in next few weeks?

Mary Jo, sorry for the difficulty in getting this scheduled. I am on a flight today, and will be traveling in Idaho next Wednesday the 26th and all day on August 1 at a Superfund Site in a remote area. I think the better way is for Jay to simply call my cell phone as he is available and see if I answer or call back immediately (which I try very hard at doing).

Kenneth E. Wagner  
*Senior Advisor to the Administrator*  
*For Regional & State Affairs*  
**US Environmental Protection Agency**  
Office: 202-564-1988  
Cell: **Ex. 6**  
[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)

On Jul 19, 2017, at 8:37 AM, Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org> wrote:

Could we get this on the calendar today?

Sent from my iPhone

Begin forwarded message:

**From:** Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>  
**Date:** July 18, 2017 at 9:42:19 AM EDT  
**To:** "Wagner, Kenneth" <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>  
**Subject:** RE: Checking in, time to catch up sometime in next few weeks?

Ken,

I had a chance to talk with Jay this morning, and he wants to proceed with an in person meeting. I'm happy to work with your scheduler to get this on the calendar, if you could share with me their name and email address, or forward my email to them.

Otherwise, I can offer the following days and times that Jay is available to meet at your office (or you are welcome to come here):

- Wednesday, July 26 – between 3:00 and 5:00p
- Tuesday, August 1

I look forward to hearing from you or someone from your office. Thank you.

MJ

*Mary Jo Tomalewski*  
Executive Assistant to the President & CEO  
CroLife America  
Direct Dial ( **Ex. 6** )

Mobile (Ex. 6)  
Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

<image002.jpg> *How can I serve you today?*

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**Sent:** Friday, July 14, 2017 4:40 PM  
**To:** Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)>  
**Subject:** Re: Checking in, time to catch up sometime in next few weeks?

If he's in Oklahoma... I could do a call?

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*Senior Advisor to the Administrator*  
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Office: 202-564-1988  
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[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)

On Jul 14, 2017, at 3:05 PM, Mary Jo Tomalewski  
<[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)> wrote:

How about Friday, July 21? Jay's open all day.

*Mary Jo Tomalewski*  
Executive Assistant to the President & CEO  
CroLife America  
Direct Dial (Ex. 6)  
Mobile (Ex. 6)  
Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

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I will be at the ECOS meeting as I'm speaking so Monday won't work. Sorry

**Kenneth E. Wagner**  
*Senior Advisor to the Administrator*  
*For Regional and State Affairs*  
**U S Environmental Protection Agency**  
**202-564-1988 office**  
Ex. 6 } cell  
wagner.kenneth@epa.gov

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<mjtomalewski@croplifeamerica.org> wrote:

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*Mary Jo Tomalewski*  
Executive Assistant to the President & CEO  
CropLife America  
Direct Dial (303) 593-3333  
Mobile (703) 593-3333 Ex. 6  
Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

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**Sent:** Monday, July 3, 2017 10:48 AM  
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Jay  
Sent from my iPhone

On Jul 3, 2017, at 8:49 AM, Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)> wrote:

Jay:

I am out until the week of the 17<sup>th</sup>, but would love to catch up then. Wednesday the 19<sup>th</sup> is the best

for me (probably in the afternoon). Let me know if that can work.

Hope all is well.

Ken

**Kenneth E. Wagner**

*Senior Advisor to the Administrator*

*For Regional and State Affairs*

**US Environmental Protection Agency**

**202-564-1988 office**

**Ex. 6 cell**

wagner.kenneth@epa.gov

---

**From:** Jay Vroom

[mailto:JVroom@croplifeamerica.org]

**Sent:** Saturday, July 1, 2017 6:04 PM

**To:** Wagner, Kenneth

<wagner.kenneth@epa.gov>

**Cc:** Mary Jo Tomalewski

<mjtomalewski@croplifeamerica.org>

**Subject:** Checking in, time to catch up sometime in next few weeks?

Hi Ken and happy July!

We have not talked in a while and since the second half of 2017 is now begun I thought it is timely to check in and see if we could get together in the coming weeks?

I'll be on travel for meetings next Wednesday and Thursday following the long holiday weekend but my assistant, Mary Jo, can follow up with you Wednesday to see what might be possible to converge our calendars.

Have a great holiday and enjoy the 4th!

Jay

Jay Vroom

President & CEO

CropLife America

1156 15th Street, NW

Suite 400

Washington, DC 20005

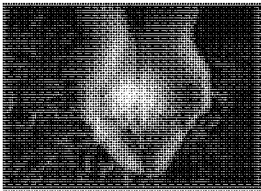
4 Ex. 6 (O)

**Ex. 6**

(M)

[Vroom@croplifeamerica.org](mailto:Vroom@croplifeamerica.org)

[www.croplifeamerica.org](http://www.croplifeamerica.org)



Message

---

**From:** Wagner, Kenneth [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=048236AB99BC4D5EA16C139B1B67719C-WAGNER, KEN]  
**Sent:** 7/14/2017 7:55:29 PM  
**To:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**Subject:** Re: Checking in, time to catch up sometime in next few weeks?

I will be at the ECOS meeting as I'm speaking so Monday won't work. Sorry

**Kenneth E. Wagner**  
*Senior Advisor to the Administrator*  
*For Regional and State Affairs*  
**U S Environmental Protection Agency**  
**202-564-1988 office**  
Ex. 6 cell  
**wagner.kenneth@epa.gov**

On Jul 14, 2017, at 1:32 PM, Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org> wrote:

Ken,

As it happens Jay will be at a meeting at EPA on Monday at 1:00p, which should end by 2:00 or 2:30p. Are you available to meet after that meeting? Or before?

MJ

*Mary Jo Tomalewski*  
Executive Assistant to the President & CEO  
CropLife America  
Direct Dial (Ex. 6)  
Mobile (Ex. 6)  
Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

<image002.jpg> *How can I serve you today?*

***Future Meetings***  
2017 Spring Regulator Conference – April 6-7, Arlington, VA  
2017 Annual Meeting – September 22-27, Dana Point, CA  
2018 Winter Board of Directors Meeting – March 5-7, Washington, DC  
2018 Annual Meeting – September 21-26, The Ritz-Carlton Amelia Island

---

**From:** Mary Jo Tomalewski  
**Sent:** Thursday, July 6, 2017 3:56 PM  
**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>  
**Cc:** Jay Vroom <[jvroom@croplifeamerica.org](mailto:jvroom@croplifeamerica.org)>  
**Subject:** FW: Checking in, time to catch up sometime in next few weeks?  
**Importance:** High

Ken,

I misspoke – would you be available for a meeting on Monday afternoon, July 17, after 1:00p?



MJ

---

**From:** Mary Jo Tomalewski  
**Sent:** Thursday, July 6, 2017 12:18 PM  
**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>  
**Subject:** RE: Checking in, time to catch up sometime in next few weeks?

Ken,

Would you be available for a phone call with Jay Vroom on Monday afternoon, July 17, after 1:00p?  
MJ

*Mary Jo Tomalewski*  
Executive Assistant to the President & CEO  
CropLife America  
Direct Dial (703) 606-1333 Ex. 6  
Mobile (703) 606-1333 Ex. 6  
Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

---

**From:** Jay Vroom  
**Sent:** Monday, July 3, 2017 10:48 AM  
**To:** Wagner, Kenneth <[wagner.kenneth@epa.gov](mailto:wagner.kenneth@epa.gov)>  
**Cc:** Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)>  
**Subject:** Re: Checking in, time to catch up sometime in next few weeks?

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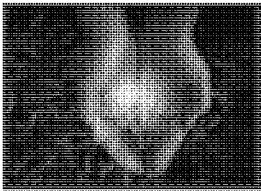
Washington, DC 20005

Ex. 6 (O)

Ex. 6 (M)

[Vroom@croplifeamerica.org](mailto:Vroom@croplifeamerica.org)

[www.croplifeamerica.org](http://www.croplifeamerica.org)



Message

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**From:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**Sent:** 5/30/2018 12:57:45 PM  
**To:** Burton, Tamika [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=207e0f24fd934d6d8a3e4c400a311638-Burton, Tam]  
**CC:** Molina, Michael [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d19c1d68da1a4587866e1850f22a6ae5-Molina, Mic]; Wheeler, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=17a1669ef5b54fba8cb457845308787e-Wheeler, An]  
**Subject:** RE: Production Ag CEO Council Communication

Thank you, Tamika! I've just sent a calendar appointment.

*Mary Jo Tomalewski*

Executive Assistant to the President & CEO

CroLife America

Direct Dial **Ex. 6 Personal**

Mobile

Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

---

**From:** Burton, Tamika [mailto:burton.tamika@epa.gov]  
**Sent:** Tuesday, May 29, 2018 3:36 PM  
**To:** Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>  
**Cc:** Molina, Michael <molina.michael@epa.gov>; Wheeler, Andrew <wheeler.andrew@epa.gov>  
**Subject:** RE: Production Ag CEO Council Communication

Hi Mary, Yes this time works! Ill be on stand-by for your calendar update.

Best Regards,

*Tamika Burton*

*Staff Assistant to the Deputy Administrator Andrew Wheeler*

*Immediate Office of the Administrator*

*MC 1104A Room 3412 WJC North*

*(202) 564-4771 (d)*

**Personal Matters / Ex. 6**

[burton.tamika@epa.gov](mailto:burton.tamika@epa.gov)

---

**From:** Mary Jo Tomalewski [mailto:mjtomalewski@croplifeamerica.org]  
**Sent:** Friday, May 25, 2018 1:52 PM  
**To:** Burton, Tamika <[burton.tamika@epa.gov](mailto:burton.tamika@epa.gov)>  
**Cc:** Molina, Michael <[molina.michael@epa.gov](mailto:molina.michael@epa.gov)>; Wheeler, Andrew <[wheeler.andrew@epa.gov](mailto:wheeler.andrew@epa.gov)>  
**Subject:** RE: Production Ag CEO Council Communication

Tamika,

Our 3 co-chairs (Jay Vroom, Chris Novak and Zippy Duvall) are all available at 2:30p (or after) on June 12. If that works, I'll send a calendar appointment.

MJ

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Mobile **Personal**

Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

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**From:** Wheeler, Andrew [<mailto:wheeler.andrew@epa.gov>]  
**Sent:** Friday, May 25, 2018 12:37 PM  
**To:** Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)>  
**Cc:** Jay Vroom <[jvroom@croplifeamerica.org](mailto:jvroom@croplifeamerica.org)>; Chris Novak ([novak@ncga.com](mailto:novak@ncga.com)) <[novak@ncga.com](mailto:novak@ncga.com)>; Zippy Duvall <[zduvall@fb.org](mailto:zduvall@fb.org)>; Burton, Tamika <[burton.tamika@epa.gov](mailto:burton.tamika@epa.gov)>; Molina, Michael <[molina.michael@epa.gov](mailto:molina.michael@epa.gov)>  
**Subject:** Re: Production Ag CEO Council Communication

How about June 12th? Please coordinate with Tamika Burton.

Sent from my iPhone

On May 25, 2018, at 12:12 PM, Mary Jo Tomalewski <[mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)> wrote:

Mr. Deputy Administrator,

Attached please find a letter from the Production Ag CEO Council Co-Chairs, Jay Vroom (CropLife America), Chris Novak (National Corn Growers Association) and Zippy Duvall (American Farm Bureau Federation).

As stated in the letter, we will follow up with you under separate cover, to set a meeting in the near future. If you would ask your scheduler to contact me, I'm happy to work with him/her to accomplish that.

If you or a member of your staff have any questions, please do not hesitate to contact me and I can make the appropriate connection.

Thank you,  
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<image002.jpg> *How can I serve you today?*

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<Deputy Administrator Andrew Wheeler.pdf>

Message

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**From:** Burton, Tamika [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=207E0F24FD934D6D8A3E4C400A311638-BURTON, TAM]  
**Sent:** 5/29/2018 7:35:48 PM  
**To:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**CC:** Molina, Michael [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d19c1d68da1a4587866e1850f22a6ae5-Molina, Mic]; Wheeler, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=17a1669ef5b54fba8cb457845308787e-Wheeler, An]  
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*burton.tamika@epa.gov*

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**To:** Burton, Tamika <burton.tamika@epa.gov>  
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**Subject:** RE: Production Ag CEO Council Communication

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Mobile **Personal Matters /**  
Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)

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**Sent:** Friday, May 25, 2018 12:37 PM  
**To:** Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>  
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**Subject:** Re: Production Ag CEO Council Communication

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<Deputy Administrator Andrew Wheeler.pdf>

Message

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**Sent:** 5/25/2018 5:51:41 PM  
**To:** Burton, Tamika [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=207e0f24fd934d6d8a3e4c400a311638-Burton, Tam]  
**CC:** Molina, Michael [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d19c1d68da1a4587866e1850f22a6ae5-Molina, Mic]; Wheeler, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=17a1669ef5b54fba8cb457845308787e-Wheeler, An]  
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**To:** Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org>  
**Cc:** Jay Vroom <JVroom@croplifeamerica.org>; Chris Novak (novak@ncga.com) <novak@ncga.com>; Zippy Duvall <zduvall@fb.org>; Burton, Tamika <burton.tamika@epa.gov>; Molina, Michael <molina.michael@epa.gov>  
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<Deputy Administrator Andrew Wheeler.pdf>

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**To:** Wheeler, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=17a1669ef5b54fba8cb457845308787e-Wheeler, An]  
**CC:** Jay Vroom [JVroom@croplifeamerica.org]; Chris Novak (novak@ncga.com) [novak@ncga.com]; Zippy Duvall [zduvall@fb.org]; Burton, Tamika [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=207e0f24fd934d6d8a3e4c400a311638-Burton, Tam]; Molina, Michael [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d19c1d68da1a4587866e1850f22a6ae5-Molina, Mic]  
**Subject:** Re: Production Ag CEO Council Communication

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Sent from my iPhone~Please excuse any typos!

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<Deputy Administrator Andrew Wheeler.pdf>

Message

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**From:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**Sent:** 5/25/2018 4:11:58 PM  
**To:** Wheeler, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=17a1669ef5b54fba8cb457845308787e-Wheeler, An]  
**CC:** Jay Vroom [JVroom@croplifeamerica.org]; Chris Novak (novak@ncga.com) [novak@ncga.com]; Zippy Duvall [zduvall@fb.org]  
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**Attachments:** Deputy Administrator Andrew Wheeler.pdf

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*How can I serve you today?*

**Future Meetings**

2018 Regulatory Conference -- April 25-27, Renaissance Capital View, **Arlington, VA**  
2018 CLA & RISE Joint Annual Meeting -- September 21-26, The Ritz-Carlton Amelia Island, **Amelia Island, FL**  
2018 Board Leader Retreat -- November 7-9, Chesapeake Farms, **Chestertown, MD**  
2019 Winter Board of Directors Meeting & Legislative Rally -- March 4-6, The Ritz-Carlton Pentagon City, **Arlington, VA**  
2019 Annual Meeting -- September 27 -- October 2, The Broadmoor, **Colorado Springs, CO**

May 25, 2018

The Honorable Andrew Wheeler  
Deputy Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington DC 20460

Dear Deputy Administrator Wheeler:

Congratulations on your recent confirmation as Deputy Administrator. We look forward to working closely with you as you begin to make progress on the significant issues facing our nation's environment and economy.

Since 2015, leaders from 17 agricultural and agribusiness organizations have met regularly as an informal Production Ag CEO Council to discuss common challenges facing food, agriculture, and the environment. You'll find a list of our current members attached. During our meeting last week, we discussed the need to identify ways that we could support EPA's current efforts to evaluate and streamline regulations that are impeding both environmental protection and business efficiency. We are writing to request a meeting with you to discuss how we might better cooperate with your agency on items of mutual interest.

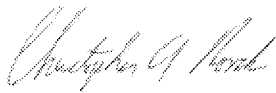
We did meet with Administrator Pruitt in March of last year (see attached agenda from that meeting), and a great deal has happened since that meeting, so we look forward to picking up that conversation with you.

Thank you for your consideration. We will follow up this note to begin to identify potential meeting dates.

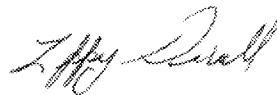
Sincerely,



Jay Vroom  
Co-Chair



Chris Novak  
Co-Chair



Zippy Duvall  
Co-Chair

attachments

**CEO Council Members**

|                                                                 |                                                              |
|-----------------------------------------------------------------|--------------------------------------------------------------|
| <b>American Farm Bureau</b>                                     | Vincent “Zippy” Duvall, President ( <b><i>Co-Chair</i></b> ) |
| <b>American Seed Trade Association</b>                          | Andrew “Andy” LaVigne, President and CEO                     |
| <b>American Soybean Association</b>                             | Ryan Findlay, CEO                                            |
| <b>Biotechnology Innovation Organization</b>                    | Dana O’Brien, Executive Vice President                       |
| <b>CropLife America</b>                                         | Jay Vroom, President and CEO ( <b><i>Co-Chair</i></b> )      |
| <b>The Fertilizer Institute</b>                                 | Chris Jahn, President                                        |
| <b>National Association of Wheat Growers</b>                    | Chandler Goule, CEO                                          |
| <b>National Cattlemen’s Beef Association</b>                    | Kendal Frazier, CEO                                          |
| <b>National Chicken Council</b>                                 | Michael Brown, President                                     |
| <b>National Corn Growers Association</b>                        | Chris Novak, CEO ( <b><i>Co-Chair</i></b> )                  |
| <b>National Cotton Council</b>                                  | Gary Adams, President and CEO                                |
| <b>National Council of Farmer Cooperatives</b>                  | Chuck Conner, President and CEO                              |
| <b>National Farmers Union</b>                                   | Roger Johnson, President                                     |
| <b>National Milk Producers Federation</b>                       | Jim Mulhern, President and CEO                               |
| <b>National Pork Producers Council</b>                          | Neil Dierks, CEO                                             |
| <b>United Fresh Produce Association</b>                         | Tom Stenzel, President and CEO                               |
| <b>USA Rice Federation</b>                                      | Betsy Ward, President & CEO                                  |
| <b>National Association of State Departments of Agriculture</b> | Barb Glenn, CEO, <b><i>ex-officio</i></b>                    |

## FINAL PROPOSED AGENDA TOPICS

**Meeting Information:** Office of EPA Administrator Scott Pruitt  
1200 Pennsylvania Avenue, NW  
Washington, DC  
Thursday, March 30, 2017 3:45-4:30 PM

| Topic                                                                                                                                                                 |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. Thanks to Trump Administration and Administrator Pruitt for <u>early decisive</u> actions:                                                                         |
| a. WOTUS                                                                                                                                                              |
| b. Chlorpyrifos Petition                                                                                                                                              |
| 2. <u>Top Priority Issues</u>                                                                                                                                         |
| a. <b>Ag Advisor Position</b> – We recommend adding additional title of “Assistant Deputy Administrator” as a title                                                   |
| b. <b>Water</b>                                                                                                                                                       |
| i. Next steps to refine / clarify beyond WOTUS                                                                                                                        |
| ii. NPDES permits (CAFO Program needs work; legislation to fix water permits NOT needed for lawful use of pesticides)                                                 |
| c. <b>Pesticides Policy</b>                                                                                                                                           |
| i. <b>Endangered Species Act</b> conflicts with Pesticide Regulation and Biotech Regulation                                                                           |
| ii. <b>Epidemiology Study Policy</b> (as aftermath from Chlorpyrifos matter)                                                                                          |
| iii. <b>Reform Certification &amp; Training and Worker Protection Rules</b> – Suspend implementation and revise                                                       |
| d. <b>Renewable Fuels Standard</b> – current program kept consistent                                                                                                  |
| e. <b>Communication / Messaging / Opinion Polling</b> – vital to all parties’ ability to advance sound policy                                                         |
| f. <b>EPA and USDA Cooperation and Coordination</b> – Already vast progress; <u>more</u> can be done!                                                                 |
| g. <b>Environmental Justice, Research &amp; Development, and Children’s Health Offices</b> – Better integration with and reform of EPA program offices; sound science |
| h. <b>Regulation of Manufacturing &amp; Mining Facilities for Ag Inputs</b> – Restore science and process                                                             |
| i. <b>Public and Science Advisory Panels</b> at EPA – Balance, strategic agendas                                                                                      |
| j. <b>“Air Emissions”</b> from farming operations                                                                                                                     |

### CEO Attendees

|                                                                 |                                                           |
|-----------------------------------------------------------------|-----------------------------------------------------------|
| <b>American Seed Trade Association</b>                          | Andrew “Andy” LaVigne, President and CEO                  |
| <b>American Soybean Association</b>                             | Steve Censky, Chief Executive Officer ( <b>Co-Chair</b> ) |
| <b>Biotechnology Innovation Organization</b>                    | Dana O’Brien, Executive Vice President                    |
| <b>CropLife America</b>                                         | Jay Vroom, President and CEO ( <b>Co-Chair</b> )          |
| <b>The Fertilizer Institute</b>                                 | Chris Jahn, President                                     |
| <b>National Association of Wheat Growers</b>                    | Chandler Goule, CEO                                       |
| <b>National Corn Growers Association</b>                        | Chris Novak, CEO ( <b>Co-Chair</b> )                      |
| <b>National Cotton Council</b>                                  | Gary Adams, President and CEO                             |
| <b>National Council of Farmer Cooperatives</b>                  | Chuck Conner, President and CEO                           |
| <b>National Pork Producers Council</b>                          | Neil Dierks, CEO                                          |
| <b>United Fresh Produce Association</b>                         | Tom Stenzel, President and CEO                            |
| <b>USA Rice Federation</b>                                      | Betsy Ward, President & CEO                               |
| <b>National Association of State Departments of Agriculture</b> | Barb Glenn, CEO, <b>ex-officio</b>                        |

### Others

|                                        |                                       |
|----------------------------------------|---------------------------------------|
| <b>American Farm Bureau Federation</b> | Dale Moore, Deputy Executive Director |
| <b>Corn Refiners Association</b>       | John Bode, President & CEO            |
| <b>National Farmers Union</b>          | Rob Larew, Senior VP                  |

Message

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**From:** Wheeler, Andrew [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=17A1669EF5B54FBA8CB457845308787E-WHEELER, AN]  
**Sent:** 4/23/2018 2:44:59 PM  
**To:** BGreenwood@croplifeamerica.org  
**Subject:** FW: CropLife America invitation

Beau, thank you for the invite. I won't be able to make it, I'm limiting myself to only internal meetings these first couple of weeks. I am happy to talk to the Council at a future date. It's good to hear from you again.

- Andrew

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**From:** Jackson, Ryan  
**Sent:** Monday, April 23, 2018 8:41 AM  
**To:** Wheeler, Andrew <wheeler.andrew@epa.gov>  
**Subject:** Fwd: CropLife America invitation

Ryan Jackson  
Chief of Staff

U.S. EPA

Personal Matters / Ex. 6

Begin forwarded message:

**From:** Beau Greenwood <BGreenwood@croplifeamerica.org>  
**Date:** April 23, 2018 at 7:59:30 AM EDT  
**To:** Ryan Jackson <jackson.ryan@epa.gov>  
**Subject:** CropLife America invitation

Good morning Ryan. I am writing to extend an invitation to Deputy Administrator Wheeler to join the CropLife America Strategic Oversight Council on Tuesday, April 24, for a listening session where we can discuss pesticide policy generally. If his calendar permits, we would like to have the Deputy Administrator join us for lunch tomorrow at noon.

I am available at your convenience to discuss this invitation in greater detail.

Thank you for your consideration.

Regards, Beau.



Beau Greenwood  
Executive Vice President  
CropLife America  
Washington, DC

Message

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**From:** Wheeler, Andrew [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=17A1669EF5B54FBA8CB457845308787E-WHEELER, AN]  
**Sent:** 5/25/2018 4:36:42 PM  
**To:** Mary Jo Tomalewski [mjtomalewski@croplifeamerica.org]  
**CC:** Jay Vroom [JVroom@croplifeamerica.org]; Chris Novak (novak@ncga.com) [novak@ncga.com]; Zippy Duvall [zduvall@fb.org]; Burton, Tamika [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=207e0f24fd934d6d8a3e4c400a311638-Burton, Tam]; Molina, Michael [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d19c1d68da1a4587866e1850f22a6ae5-Molina, Mic]  
**Subject:** Re: Production Ag CEO Council Communication

How about June 12th? Please coordinate with Tamika Burton.

Sent from my iPhone

On May 25, 2018, at 12:12 PM, Mary Jo Tomalewski <mjtomalewski@croplifeamerica.org> wrote:

Mr. Deputy Administrator,

Attached please find a letter from the Production Ag CEO Council Co-Chairs, Jay Vroom (CropLife America), Chris Novak (National Corn Growers Association) and Zippy Duvall (American Farm Bureau Federation).

As stated in the letter, we will follow up with you under separate cover, to set a meeting in the near future. If you would ask your scheduler to contact me, I'm happy to work with him/her to accomplish that.

If you or a member of your staff have any questions, please do not hesitate to contact me and I can make the appropriate connection.

Thank you,  
MJ

*Mary Jo Tomalewski*  
Executive Assistant to the President & CEO  
CropLife America  
1156 15th Street, NW  
Suite 400  
Washington, DC 20005  
Direct Dial **Ex. 6 Personal**  
Main Switchboard (202) 296-1585  
Mobile **Personal**  
Fax (202) 466-5832  
Email [mjtomalewski@croplifeamerica.org](mailto:mjtomalewski@croplifeamerica.org)  
Web [www.croplifeamerica.org](http://www.croplifeamerica.org)

<image002.jpg> *How can I serve you today?*

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<Deputy Administrator Andrew Wheeler.pdf>